Saskatchewan
Justice

Liens in the Construction Industry

A Report Prepared for
The Hon. J. Gary Lane, Q.C.,
Minister of Justice

By the Special Advisory
Committee to the Minister of
Justice on Builders' Liens

August, 1984

85-3035/

Additional copies of the report
may be obtained from:

Property and Procurement Unit
Department of Justice
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7

LETTER OF TRANSMITTAL

August 29, 1984

The Honourable J. Gary Lane, Q.C.
Minister of Justice
and Attorney General for Saskatchewan
Room 345, Legislative Building
Regina, Saskatchewan
S4S 0B3

Dear Mr. Lane:

In May of 1983 you referred The Mechanics' Lien Act for review to the undersigned. This Committee is now ready to submit its report to you for your consideration.

The Committee met continually throughout this past year. By means of individual letters and advertising in several local newspapers, the Committee solicited the response of a wide cross-section of the construction industry. The Committee released "Tentative Proposals for a New Builders' Lien Act" in February of 1984 and asked all of those persons and groups who had submitted briefs during the early stages of its review to submit their response to these proposals. The Committee would like to thank, through you, all of those persons, who during this past year, have submitted briefs and letters to the Committee. These written responses have been of great assistance to the Committee in its deliberations.

Following the release of its interim report, the Committee began a systematic review of its proposals both in light of the responses received and further research and study by the Committee. This Final Report represents the culmination of the Committee's work.

We would like to thank you for the opportunity to review The Mechanics' Lien Act and to propose a new Builders' Lien Act.

Yours truly,

Gary Semenchuck
Gary G.W. Semenchuck, Q.C.
Chairman

Ted Zarzeczny, Jr.
Committee Member

16

W. Kirk Banadyga
W. Kirk Banadyga, F.R.A.I.C.
Committee Member

Jackson
Georgina R. Jackson
Master of Titles
Committee Secretary

LIENS IN THE CONSTRUCTION INDUSTRY

A REPORT PREPARED FOR

THE HON. J. GARY LANE, Q.C.

MINISTER OF JUSTICE

BY THE SPECIAL ADVISORY
COMMITTEE TO THE MINISTER OF
JUSTICE ON BUILDERS' LIENS:

Mr. Gary G.W. Semenchuck, Q.C. (Chairman)
Mr. Ted Zarzeczny, Jr.
Mr. W. Kirk Banadyga, F.R.A.I.C.
Mrs. Georgina R. Jackson (Secretary)

AUGUST, 1984

THE COMMITTEE WOULD LIKE TO GRATEFULLY
ACKNOWLEDGE THE ASSISTANCE OF
MRS. GAIL WOLBAUM AND MRS. KAREN LOWE
FOR THE SECRETARIAL SERVICES NECESSARY
IN THE PREPARATION OF THIS REPORT.

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List of persons submitting briefs or comments to the Committee before release of the "Tentative Proposals"

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APPENDIX "D"
Draft - The Builders' Lien Act

INTRODUCTION

A. PURPOSE OF THE MECHANICS' LIEN ACT

The purpose of The Mechanics' Lien Act has often been stated by the courts. Most recently, Mr. Justice Cameron in Hansen et al. v. C.N.R. et al., [1983] 4 W.W.R. 23 (Sask. C.A.) at page 34 indicated the purpose to be:

> ...the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so. It is intended that those persons enjoy greater protection and better remedies, in relation to moneys coming to them, than the protection and remedies afforded to them, generally, by the law.

Two factors in relation to the construction industry dictate the format of the Act. First, construction in Canada and the United States is based on a model shaped much like a pyramid with the owner at the head. In most cases, the owner contracts his work to a general contractor who in turn contracts with a number of sub-trades. Very little of the actual construction is performed by persons in direct contractual relation with the owner. This develops a complex interweaving of relationships with the persons at the bottom of the pyramid improving the land but not having any recourse to the land. Their remedy is against the person who employs them who is dependent on the person who employs him and so on. The ordinary law of contract does not provide sufficient remedies to ensure that funds flow from the top of the construction pyramid and work, services and materials flow from the bottom. Secondly, the work, services and materials supplied with respect to an improvement are provided on credit. To supplement the law of contract and to foster the provision of credit a complex piece of legislation has been developed. The Mechanics' Lien Act accomplishes these objectives by creating two main sets of rights: the trust and the lien. The trust is intended to ensure that moneys received with respect to a construction project are used on that project. The right to any person supplying work, services or materials to lien the land ensures some security in the event of default. Numerous miscellaneous benefits are also part of the Act like the right to demand information from parties in the pyramid and persons financing the project. Not the least of the benefits to be derived from mechanics' lien legislation is the assurance that a multiplicity of actions arising out of one job site are resolved in one action. It will be seen that the original purposes of the Act have been augmented by a comprehensive piece of legislation which is intended to assist and facilitate construction.

B. LEGISLATIVE HISTORY IN SASKATCHEWAN

Saskatchewan's first mechanics' lien legislation was The Mechanics' Lien Ordinance, Consolidated Ordinances of the Territories, 1898, c. 59. This statute established that every "mechanic, machinist, builder, miner, labourer, contractor or other person doing work...shall...have a lien for the price of the work". This lien attached to the estate of the owner who was entitled to retain 10% of the price for 30 days after the completion of the contract. The legislation provided specifically for arbitration as an alternative to settling accounts in the Supreme Court. The basic structure of the Act was the same as the current provisions establishing the lien remedy.

In 1903 The Mechanics' Lien Ordinance was amended to provide that no contractor or subcontractor would be entitled to receive any payment on contracts in excess of $500 unless the receipted payroll had been posted and receipts from labourers were presented to the paymaster on the contract. The contract price could not be diminished by any prior or subsequent indebtedness, set off or counterclaim in favour of the owner against the contractor. A form for the payroll was provided.

The Mechanics' Lien Act was consolidated in 1907 providing more definitions, precluding labourers from contracting out of the Act, increasing the holdback percentage to 20%, and removing specific reference to the arbitration procedure.

The Mechanics' Lien Amendment Act of 1913 extended the time to file a claim of lien and commence an action except "as against intervening parties becoming entitled to a lien or charge...or as against an owner in respect of payments made in good faith to a contractor".

In 1939 provision was made for the registration of claims of lien in connection with any mine, mining claim, mining land, oil well or gas well held from or under the Crown with the Department of Natural Resources instead of with the Registrar of Land Titles. Further details with respect to registrations of this nature were added in 1957.

An attempt was made to improve the procedure for enforcing liens in 1943 by requiring that no action to realize under a lien could be commenced except by leave of the court. At the time of the application the judge was required to stipulate the persons to whom notice would be given, provide for the nature of service and how service should be proven. Upon the return date, the judge was given wide powers of inquiry.

The present rules with respect to determining the statutory period for registration of the lien were added in 1958.

On March 2, 1962, a Royal Commission was established under The Public Inquiries Act directing The Honourable Harold Francis Thomson, Q.C., as Commissioner and Mr. D.G. McLeod, Q.C., of counsel to the Commission, to review and report with respect to the Act. In May of 1963, the Thomson Commission Report was filed with the government. No action was taken on that report until 1970, when Bill 78, of 1970, which substantially incorporated the provisions of the Thomson Report, was submitted to the legislature but after receiving first reading was dropped from the order paper.

The right to claim a lien with respect to equipment rented for use or used on the contract site was established in 1971. In addition, the 1971 amending Act implemented the variation in the amounts of the holdback: 20% where the contract price is less than or equal to $25,000 and 15% for all other contracts. The Minister's second reading speech indicated that the Act was amended to improve "cash flow" by permitting the payment out in full of subcontractors where the contract is not necessarily completed but the subcontract is complete.

In 1973 a new Mechanics' Lien Act, designed to implement the Thomson Report, was passed. There were, however, some substantial departures from the Thomson Report. The Thomson Report had recommended that the position of the Crown as owner be assimilated as far as possible with that of the private owner. On May 4, 1973, the day of assent of The Mechanics' Lien Act, a new Act called The Public Works Creditors' Payment Act was passed. This Act established a separate procedure, albeit similar to the trust provisions in the new Mechanics' Lien Act, for Crown-owned construction projects. Other amendments recommended by the Thomson Report and not proceeded with included a mechanism to more readily charge the leasehold estate and to vacate registered liens. The 1973 Act implemented the trust concept which had not been recommended by the Thomson Report and also refined the procedure for commencing actions.

In 1974 the new Act was amended to ensure that the offence of criminal breach of trust could only be committed "knowingly". The lien on condominium property provisions were also clarified.

The Public Works' Creditors Payment Act was repealed on May 4, 1979. The Mechanics' Lien Act was amended to provide for its application to the Crown except that the lien provisions would not apply to Crown lands.

In 1981 with the amalgamation of Her Majesty's Court of Queen's Bench and the District Court, the Court of Queen's Bench assumed jurisdiction over mechanics' lien matters.

Appendix "A" provides the citations for all amendments made to date.

C. REFORM ACTIVITY ELSEWHERE

Since the Thomson Report was filed in 1963, a number of the provinces have conducted major Mechanics' Lien Act reviews. In 1972 the British Columbia Law Reform Commission released a report entitled "Report on Debtor Creditor Relationships Part 2 Mechanics' Lien Act: Improvements on Land" hereinafter referred to as the "B.C. Report". To date this report has not resulted in legislation. The Nova Scotia Law Reform Advisory Commission reported to its Attorney General in 1976 on "Builders' Liens", hereinafter referred to as the "Nova Scotia Report (1976)".

This was followed by a second Report, distributed in 1979, containing draft legislation. Some of the recommendations contained in the second report were the basis for amendments to the Nova Scotia Act: see An Act to Amend Chapter 178 of the Revised Statute 1967, The Mechanics' Lien Act, S.N.S., c. 33 and c. 34. In 1979, the Manitoba Law Reform Commission released its report on "Mechanics' Liens Legislation in Manitoba". This resulted in a new Act called The Builders' Liens Act assented to on May 26, 1981, and proclaimed in force September 28, 1981. Also, in 1979 Alberta's Institute of Law Research and Reform completed its work on "Report No. 30 The Builders' Lien Act: Certain Specific Problems". No legislation has been forthcoming in Alberta. Ontario has been very active in reviewing its legislation. In 1980, the Ministry of the Attorney General distributed a "Discussion Paper on the Draft Construction Lien Act", hereinafter referred to as the "Ontario Discussion Draft". To review comments on this draft the Attorney General of Ontario established a twelve man committee which released its "Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act", in April of 1982, hereinafter referred to as the "Ontario Committee Report". Ontario gave royal assent to its new Construction Lien Act on January 27, 1983, which was proclaimed in force on April 2, 1983. Both the recent Manitoba legislation and the Ontario legislation will be referred to extensively in this Report. Alberta has recently established a special Cabinet Committee to conduct another review of its legislation.

D. REASONS FOR REVIEW

Many of the problems which prompted a review of this type of legislation in the other provinces do not exist in Saskatchewan. The Thomson Report resulted in a number of amendments to clarify the Act. The implementation of the trust concept in 1973 gave an added benefit to those persons providing work, services or materials to construction projects and, unlike some jurisdictions who have recently reviewed their legislation, Saskatchewan has had the benefit of years of case law with respect to the trust in developing the trust provisions. However, in the last ten years, the number of cases and the extensive research done by all provinces have revealed technical difficulties in the Act. The Saskatchewan Act tracks closely The Mechanics' Lien Act of Ontario passed in 1970. The new Ontario Act makes a number of changes to that Act. Reduction of the holdback in Ontario and Manitoba, a restructuring of mortgage priorities in Ontario, and the establishment of an interest bearing joint holdback trust account in Manitoba are a few of the legislative changes which make it important for Saskatchewan to examine its Mechanics' Lien Act to see whether or not it should be amended. Also, the Saskatchewan Construction Association which has played an important monitoring role with respect to The Mechanics' Lien Act has urged a number of the innovations made by Manitoba and Ontario upon the Saskatchewan Government.

E. FORMAT OF THE REPORT

The Report reviews in detail the Committee's reasons for major decisions. The Committee hopes that by providing an explanation of the existing law and the proposed changes it will be easier for the Bar and the construction industry, as a whole, to interpret the proposals.

Appendix "B" lists those persons who have provided briefs or comments to the Committee prior to the release of the Committee's "Tentative Proposals" and Appendix "C" provides a list of the persons who responded to the Committee's first report.

Appendix "D" is a draft of the proposed new Act with a brief explanation and a comparison to the present Mechanics' Lien Act.

PART I

I. THE TRUST

General

The Thomson Commission Report, released in May of 1965, recommended against inclusion of trust provisions. His Honour Judge Thomson felt that the inclusion of trust provisions at that time would be importing too many issues which as yet were unresolved. Between 1965, the year of the release of the Thomson Report and 1973, when the new Act was introduced, Ontario passed comprehensive legislation designed to clarify the trust provisions. When further representations were sought with respect to Bill 78 being An Act to Amend the Mechanics' Lien Act, introduced in 1971, the Saskatchewan Construction Association strongly recommended that trust provisions be included in the new legislation. Accordingly, the 1973 Act saw, for the first time, the introduction of the mechanics' lien trust in Saskatchewan.

Manitoba was the first province (1932) to introduce the trust concept. Manitoba was followed by Ontario (1942), British Columbia (1948), and New Brunswick (1959).

A number of briefs received by the Committee indicated confusion in the industry as to how the trust and the lien interact. The Committee concluded that the trust and the lien are alternative remedies. To speak of a lien claimant asserting a claim to trust funds is theoretically incorrect. The trust is designed to ensure that funds earmarked for a project are not siphoned off for some other purpose. In this regard, the position of the trust sections in the Act is important. These sections are the starting point for a successful project just as they are the commencement of the Act. If there is compliance with these sections the construction project has a greater chance of success. The remedy to enforce the trust is to bring an action for breach of trust and, as will be seen, it is only those persons in direct contractual relationship with the trustee who can bring such an action. The lien is distinct from the trust. It is really a misnomer to speak of registering a lien to claim on the trust funds. It so happens that the funds are the same but the remedy is distinct. The remedy of the lien is against the land and the holdback fund. Registration of the lien, as a matter of practice requires the owner, mortgagee or his or their agents to take some action but if the owner has maintained the required holdback the remedy against the land cannot be pursued.

The main purpose for the creation of the trust is to ensure that moneys that are in the construction pyramid for the purposes of the improvement are kept in the pyramid. In this regard, the vehicle of the trust is immensely suited. Monies held by a trustee should not be the subject matter of a garnishee summons or other debt enforcement mechanisms. A trustee who makes an assignment in bankruptcy cannot be divested of money held for his beneficiaries. Similarly, if the trust provisions are drafted succinctly and interpreted correctly, moneys in a trustee's bank account cannot be applied to debts which the bank may have against the trustee if the debt does not have its origin in the construction project. With the main purpose, as stated, as a first principle, the Committee turned to examine the issues related to the trust provisions.

1. Can the nature of a trust under The Mechanics' Lien Act be more clearly defined?

In a masterpiece of complex drafting, the current Act constitutes the following trust funds for the following beneficiaries until the happening of the specified event:

Subsection	Trustee	Beneficiaries	When Trust Discharged
3(1)	sums received by builder, contractor or subcontractor on account of contract price	owner, builder, contractor, subcontractor, the Workers' Compensation Board, workmen, materialmen and persons who have supplied services	after all workmen, materialmen subcontractors and Workers' Compensation are paid
3(3)	sums in owners' hands which become payable following progress certificate	contractor, subcontractor, workmen, Workers' Compensation Board, workmen, materialmen, and persons who have supplied services	(a) when paid to contractor; (b) after all workmen, etc. are paid
3(4)	sums received by owner to be used in financing less purchase price of land and payment of prior encumbrances	owner, builder, contractor, subcontractor, the Workers' Compensation Board, workmen, materialmen and persons who have supplied services	after all workmen, materialmen, subcontractors and Workers' Compensation are paid

Subsections 3(2) and 3(6) of the Act create exceptions allowing a builder, contractor or subcontractor who has paid for materials, etc., to reimburse himself with trust funds or a trustee who has paid for work, services or materials with borrowed funds to reimburse the lender with trust funds.

Due to the overlap in each of the subsections creating trusts, it is not readily apparent that there must be privity of contract in order for a beneficiary to make a claim upon a trustee. However, all of the reported decisions squarely dealing with the question of privity have held that privity of contract, and therefore of trust, must exist between the beneficiary and his trustee. In Saskatchewan, the authority on point is Western Supplies Limited v. Cana Construction Company, [1976] 1 W.W.R. 289 (Sask. D.C.). Although this case involved the interpretation of The Public Works Creditors' Payment Act, and the trust provisions therein, the sections were identical to the present Mechanics' Lien Act. The Committee found this interpretation of the trust sections to be acceptable and felt the sections should be drafted to reflect the need for privity.

Section 3 creates the trust not only for persons contracting with the trustee beneath him in the pyramid but also above him. In light of the avowed intention of the legislation, to protect those who provide services and materials, it is difficult to understand the circumstances in which an owner or contractor who has released funds could also be a beneficiary. The Committee can postulate only one problem which may find its resolution in a trust which is a trust not only for the persons beneath the payer but also above him. This problem is the one which arises where the owner or other payer pays more money towards the improvement than the actual value of the work, services or materials would warrant. Under such circumstances, it was urged upon the Committee, that a trust is created for the owner or other payer to ensure the commencement or completion, as the case may be, of the project.

However, the express wording of the section creates a trust only until "all workmen and all persons who have supplied material on the contract or work or services on the contract site and all subcontractors are paid for work done, services rendered or materials supplied on the contract and The Workers' Compensation Board is paid any assessment with respect thereto" and not until the work for which the moneys are advanced is completed. It was the Committee's opinion that this issue is not one that should be resolved in the context of the Act and is better left to the parties in each individual transaction forming part of the construction pyramid. A related issue, the trustee's right to set off, which could possibly be resolved by making the payer a beneficiary will be addressed later in this report.

As mentioned, the sums discussed in subsection 3(1) remain trust funds until all workmen, etc., are paid. The Committee found that if this obligation were interpreted literally the trustee would be placed in an impossible position. It gives the impression that the trustee must see to the payment of workmen, etc., who may not be in direct contractual relationship with the trustee. Accordingly, the

Committee felt that the legislation should make it clear that the obligation of the trustee is ended as soon as payment is made to those persons contracting directly with the trustee.

The Committee also considered the point at which a trust fund is created in the hands of the owner. It would seem that one way of rationalizing subsections 3(3) and (4) is to consider subsection (3) as creating a trust in the hands of the owner in non-financing situations i.e., where the owner has sufficient funds to build, and subsection (4) as creating a trust fund where the owner borrows funds. Unless the subsections are interpreted in this way, the two subsections could see a trust imposed upon a trust and although the beneficiaries are the same, it is definitely confusing. However, even with this interpretation, where the Crown is the owner and financing the project, under the existing Act it is necessary to constitute a trust of moneys in the owner's hands, where sums become payable under a certificate of a person authorized to give such a certificate. The possibility of overlap between the sections and the creation of a trust on a trust would seem to be unnecessary, and does not, in any way, provide greater protection for the beneficiaries of the trust. What is desired is the creation of a trust, in the payer's hands, of moneys received or earmarked for an improvement.

The Committee noted that the Workers' Compensation Board is named a beneficiary of the trusts constituted in section 3. Sections 133 and 159 of The Workers' Compensation Act, S.S. 1979, c.W-17.1 impose a liability on owners and principals for any sums that the contractor or subcontractor become liable to pay to the workers' compensation fund. Based on sections 133 and 159, if a contractor fails to pay an assessment with respect to his employees, the principal or the owner can become liable to the Board with respect to the assessment. In the light of these sections, it is difficult to understand why the Board is constituted a beneficiary under The Mechanics' Lien Act. Since there must be privity of contract between a trustee and his beneficiary, the imposition of the trust adds little to what already exists in sections 133 and 159. The Board is not entitled to any priority over mechanics' lien claimants: Shoquist Construction Company v. Norfolk & Retailers Trust and Savings Company et al., [1974] 5 W.W.R. 513 (Sask. Q.B.); Re Mechanics' Lien Act Hudson's Bay Oil and Gas Company Ltd. v. Trustee in Bankruptcy of FPC Construction Ltd., Workmen's Compensation Board et al (1969), 67 W.W.R. 665 (Alta. S.C.); Union Electric Supply Co. v. Gillin Engineering & Construction Ltd. et al., [1971] 3 O.R. 125 (Ont. H.C.). The last case is of special significance in that it was decided in a jurisdiction at a time when the Board was constituted a beneficiary of a trust. The Committee felt that to include the

Board as a beneficiary gives the impression of a priority position which does not exist. To remove the Board's status as a beneficiary is consistent with the avowed principle of ensuring that a trust is constituted for those persons who improve the land. Third parties who do not improve the land should not participate in the trust or be able to attach trust moneys. The only time the Board's presence as a beneficiary becomes significant is when there has been a default of some sort resulting in a breach of trust action. At that point to allow the owner or contractor to reduce his liability for failing to attend to his obligation under The Workers' Compensation Act seems to the Committee to be an improper use of the trust concept. The Committee found support for its position in the Ontario Committee Report and the Ontario Construction Lien Act which saw the elimination of the Board as a trustee in Ontario.

The Committee received one brief requesting that the Government of Saskatchewan be added as a beneficiary of the trust for the purposes of The Education and Health Tax Act. This submission lends further support for the elimination of the Workers' Compensation Board as a beneficiary in that a workers' compensation assessment, like education and health tax, is just one of the extra charges which is required to be paid during the construction of an improvement. To constitute one or any of these third parties a beneficiary is inconsistent with the purposes for which the trust was constituted. The fact that these agencies are not beneficiaries does not eliminate the fact that they must be paid, but since they are not beneficiaries, they assert no special claim with or against trust beneficiaries or mechanics' lien claimants.

Recommendations:

1. There must be privity of contract between a trustee and his beneficiary.
2. There should be no trust for the payer of trust moneys.
3. The trust should terminate upon payment to the beneficiary.
4. The Act should clearly constitute a trust in the owner's hands of money borrowed for a project or, in the case of the Crown or where the owner receives money otherwise than through borrowing, when the moneys are due and payable under the project.
5. The Workers' Compensation Board should not be constituted a trust beneficiary.

2. Whether the proceeds of the sale of improved property should constitute trust funds?

Present Law

Under a land titles system, an interest in land is ineffective against third parties unless it is registered. Similarly the definition of owner in The Mechanics' Lien Act would, in most cases, prevent a lien claimant from asserting his interest against a transferee from the owner of the improved property unless his interest was registered before registration of the transfer. This can work a hardship on the lien claimants. Although it is not possible to allow the lien claimant to assert his interest against the transferee, without seriously offending Torrens land titles principles, it is possible to impress sale proceeds with a trust. The Ontario solution to this problem was to constitute a trust of the sale proceeds, less reasonable costs and any amounts necessary to discharge any pre-existing mortgage, in the transferor's hands. The Ontario section is as follows:

> 9(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> > (a) the value of the consideration received by the owner as a result of the sale,
>
> less,

> > (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
>
> constitutes a trust fund for the benefit of the contractor.
>
> (2) The former owner is the trustee of the trust created by subsection (1), and he shall not appropriate or convert any part of the trust property to his own use or to any use inconsistent with the trust until the contractor is paid all amounts owing to him related to the improvement.

The comment has been made with respect to whether this section should extend to forced sales. Although this might be a criticism of the legislation as it operates in Ontario, the Committee felt that, in Saskatchewan, since it is not possible for a mortgagee or a vendor to foreclose without the intervention of the court, this issue was best resolved according to the court's discretion to order a judicial sale of the property and that in proceeding with a section like Ontario's section 9 it should be confined to voluntary sales by vendors of improved property.

Recommendation:

The proceeds of the sale of improved property should constitute a trust fund in the owner's hands less reasonable costs of sale and amounts necessary to discharge any pre-existing indebtedness until the contractor is paid.

3. Whether the legislation should specify how the trust money should be distributed?

Subsection 5(2) of The Mechanics' Lien Act provides that the builder, contractor or subcontractor shall distribute trust money among the beneficiaries of the trust "according to the liabilities of the builder, contractor or subcontractor to such persons, on a pro rata basis". The Bar Admission Course materials at page 43 criticize this directive to the trustee on the following grounds:

> This (referring to the pro rata distribution requirement) poses such practical difficulties that Ontario did not impose this requirement. For example, any progress payment received must be pro rata but the Act does not state whether it is to be done on accounts owing at the time of the certificate or whether it is to be based on liens existing at the time of payment out to the lien holders. There is invariably a few days lag between the certificate and time of payment.

The article goes on to pose the question as to how the trustee calculates a pro rata distribution when he is paying out his labourers and materialmen completely and holding back from other persons contracting directly with him.

The pro rata requirement appears to be a Saskatchewan innovation. In those jurisdictions which do not have this requirement it would appear that the trustee distributes according to practical business sense based on the contractual obligations upon him (see Minneapolis-Honeywell Regulator Company v. Empire Brass Manufacturing Company, [1955] S.C.R. 694). In fact, in the case of Re Putherbough Construction Company Limited (1958), 37 C.B.R. 6 (Ont. S.C.T.D.) the following comment appears at page 9:

> ...it would be impractical to require the contractor to pay the proceeds of the contract rateably to the beneficiaries mentioned and specified...during the ordinary course of construction.... a contractor makes payments to creditors in the ordinary course of business and naturally he could not be expected to be called to account for those payments in the case of a later deficiency nor could the creditors who were entitled to receive payment, that is who are beneficiaries of the fund, be expected to return such payments. Business could not be carried on in such uncertainty as requirements of that nature would entail or create.

These comments were approved in the decision of Guaranty Trust Company of Canada v. Beaumont, [1967] 1 O.R. 479 (Ont. C.A.). Both in the Putherbough and Guaranty Trust decisions, the court agreed that when the contract is abandoned or one of the principals is bankrupt, the trust fund would then have to be distributed on a pro rata basis not on the basis of any direction in the statute but according to the ordinary law of trusts.

A related issue arises when a trustee/owner is about to pay out his beneficiary (the contractor) and the owner is advised that a lien has been registered on the property. If he pays the contractor, the only person who can legally object is the contractor because there must be privity of contract to sue the trustee for breach of trust and, of course, the contractor could not sue because he has received the money. Clearly, the owner pays the contractor at his peril not because of the trust remedy but because of the lien remedy, and if he has received written notice of the lien (which will be addressed later) he is required, under the proposals contained in this Report, to retain an amount equal to the amount of the claim.

Another related issue arises in the context of payments by the contractor/trustee or the subcontractor/trustee when there are some beneficiaries who have registered lien claims and some who have not and whose lien period has expired. The question has been asked whether the trustee is in breach of trust if he pays the latter group of beneficiaries. As will be pointed out later, it is the Committee's view that the expiry of the lien period does not affect the rights of a trust beneficiary and accordingly a trustee who pays out beneficiaries who no longer have lien rights cannot be liable.

Recommendation:

There should be no requirement imposed by the legislation upon the trustee as to how he should distribute the funds.

4. Whether a trustee should be able to set off against trust funds any claim that he may have against a beneficiary?

Under The Mechanics' Lien Act in existence prior to the 1973 Act it was considered possible for an owner or other payer to set off funds over and above the holdback as against debts arising between the payer and the payee. Even with the inclusion of trust provisions, this probably continues under the present Act. Subsection 3(1) of the Act creates a trust of moneys in the hands of a builder, contractor or subcontractor for the owner, builder, contractor or subcontractor which implies the existence of the power to set off and subsection 46(10) allows a defendant in an action to set off his claim against any plaintiff or defendant. However, some commentators are of the opinion that the differences which existed between the Ontario and Saskatchewan Acts and the other Mechanics' Lien Acts in Canada could have effected some changes with respect to the law of set off. In Ontario, prior to the new legislation and in Saskatchewan under the present legislation the trust created by subsection 3(3) (trust upon certificate) is imposed upon the trust created by subsection 3(4) (trust upon borrowed funds) and this may have eliminated the right of set off. Furthermore subsection 5(1) provides that "every person for whose benefit a trust is created...has...a lien upon the trust fund...and the lien takes priority over all general or special assignments and judgments, attachments, garnishments and receiving orders of the contract price or any portion of the price whenever received, used or made and of any right of set off". In the text by Macklem and Bristow Mechanics' Liens in Canada (4th edition) at page 236 the authors comment on subsection 2(3) of the Ontario Act and 3(3) of the Saskatchewan Act and conclude that the owner is apparently prohibited from using moneys which become payable on such a certificate for any purpose not authorized by the trust until all of the beneficiaries have been paid. It would appear then that, on a strict reading of this section, such moneys cannot be used by the owner to complete an abandoned contract. However, the author goes on to cite the case of Standard Industries Limited v. Treasury Trails Holdings Limited (1976), 24 C.B.R. (N.S.) 8, (Ont. C.C.) affirmed 23 C.B.R. (N.S.) 244 (Ont. C.A.) as authority for the proposition that in Ontario and Saskatchewan in spite of the different legislation there may be a right of set off between the owner and the general contractor and other trustees and beneficiaries in order to determine the quantum of the trust fund. The court, in Standard Industries, relied on the opening words of subsection 2(3) of the Ontario Act which provide "where a sum becomes payable..." and concluded that if the moneys certified for payment do not become payable to the contractor, by reason of the owner exercising his right to set off his claim for damages against the contractor for the cost of completing or correcting his work, then the trust fund does not arise, (see pages 236 and 275 of Macklem and Bristow). In Saskatchewan, Wimmer, J. in Northern Lights School Division 113 v. Government of Saskatchewan et al, [1981] 6 W.W.R. 503 (Sask. Q.B.), considered whether subsection 5(1) precluded an owner from setting off the cost of completion and resulting damages against moneys payable under the contract over and above the statutory holdback. His Lordship concluded that an owner should be entitled as far as possible to get the work at the contract price. Although subsections 3(1) and 5(1) give the impression that funds in excess of the holdback, which, but for abandonment belong to the contractor, are trust funds, subsection 18(1) limits the liability of the owner to "the sum payable by the owner to the contractor". Accordingly the owner was allowed to set off the cost of completion and resulting damages against moneys payable under the contract over and above the statutory holdback.

It is difficult to understand a policy which precludes the right to set off as long as the debt which is the amount of the set off arose as a result of the improvement. It would seem preferable to clarify this issue in The Mechanics' Lien Act rather than leaving it for eventual determination by the courts in Saskatchewan. The Committee considered the following section contained in the new Ontario legislation:

> 12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between himself and the person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to the improvement.

The reference to Part IV is to ensure that the trustee cannot set off with respect to the holdback. The ability to set off debts unrelated to the improvement appears to be a codification of Royal Trust Co. v. Trustee of the Estate of Universal Sheet Metals Ltd., [1970] 1 O.R. 374 (Ont. C.A.) where Schroeder, J.A. held that setting off of debts due to the contractor by the subcontractor is not a diversion of the benefit of the trust, even if the debts are of a different nature.

The Committee was concerned that to allow set off with respect to debts, claims or damages not incurred on the construction project was contrary to the principle of ensuring that money with respect to a particular project should be kept in the construction pyramid. With this limitation, the Committee resolved that the legislation should reflect the decision that a trustee be allowed to set off.

Recommendation:

A trustee should be able to set off, as against his beneficiary, debts, claims or damages incurred with respect to the improvement as to all amounts in his hands up to but not including the holdback.

5. Whether the legislation should establish the priorities between trust beneficiaries and third parties with claims against the trustee?

Broadly speaking, potential third party claimants fall into five main categories:

(a) a secured creditor claiming under a security agreement or section 178 Bank Act agreement claiming money either as original collateral or as proceeds of goods;

(b) an assignee claiming under either a specific or a general assignment of book debts granted by a trustee to secure past, present and future indebtedness;

(c) an assignee under a specific assignment of contract moneys granted by the trustee as an absolute assignment;

(d) a financial institution, acting as the banker to a trustee, which has granted an operating line of credit or overdraft privileges and which holds the operating account of the trustee;

(e) other unsecured creditors including representatives of creditors of the trustee acting under some debt enforcement mechanism like a writ of execution, a garnishee summons, equitable receivership, etc..

In the existing Act subsection 5(1) is the priority section dealing with rights of beneficiaries in conflict with creditors of trustees. It provides as follows:

> 5(1) Every person for whose benefit a trust is created by section 3 or 4 has, subject to the provisions of that section, a lien upon the trust fund for the value of the work done, services rendered or materials supplied or furnished by that person and the

> lien takes priority over all general or special assignments and judgments, attachments, garnishments and receiving orders of the contract price or any portion of the price whenever received, used or made and of any right of set off.

Obviously, this subsection is only designed to deal with categories (b), (c) and (e) above. The first and fourth categories must find resolution elsewhere.

Before Manitoba passed its recent legislation, no trust jurisdiction had a priority section like Saskatchewan's subsection 5(1). The earliest case of significance in this area was Minneapolis - Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Company, [1955] S.C.R. 694 which held that no assignment could destroy the rights of a trust beneficiary. This case was decided on the British Columbia Act which contained no priority section for trusts. Subsequently, the British Columbia legislature added the words "or trust" which appear in the following section:

> 19(1) No assignment by the contractor or subcontractor of any moneys due in respect of the contract is valid as against any lien or trust created by this Act.

Ontario has never had a priority section dealing with third party claimants in conflict with trust beneficiaries.

The New Brunswick legislation is like Ontario's in this regard. Manitoba's new Act contains, for the first time, the following subsections:

> 6(2) Where money owing to a contractor or sub-contractor in respect of the contract price under a contract or sub-contract would, if paid to the contractor or sub-contractor, be subject to a trust under section 4, the money is not subject to garnishment under The Garnishment Act.
>
> (3) No assignment by the contractor or sub-contractor of any moneys due or to become due on account of the contract price under a contract or sub-contract is valid as against any lien or trust created under this Act.
>
> (4) Where a right to payment of moneys, which upon receipt by the assignor would be subject to a trust under this Act, is assigned, or purported to be assigned, moneys received by the assignee under the assignment or purported assignment are subject to the trust and the assignee is the trustee.

The Saskatchewan position is complicated by the creation of "a lien upon the trust fund for the value of the work done, services rendered or materials supplied or furnished by that person" (see s.5(1) of Sask. Act).

The first priority conflict arises between trust beneficiaries and secured parties claiming a security interest in money as original collateral or as proceeds of goods. This issue only arises with respect to funds in the owner's hands, described in the present Act as "an amount equal to the sum so certified that is in the owner's hands or received by him at any time" after a sum becomes payable under a contract to a contractor by an owner on the certificate of a person authorized to give such a certificate (see s. 3(3) Sask. Act). As mentioned previously, the Committee felt subsections 3(3) and 3(4) of the Saskatchewan Act could be rationalized by viewing subsection 3(3) as creating a trust in situations where subsection 3(4) did not apply i.e., where the owner because of his own capital reserves was not required to borrow for the purposes of the improvement, and, of course, to the Crown regardless of whether or not the Crown had to finance the project. Given this assumption, the Committee felt that there was no need to confine the application of subsection 3(3) to where money becomes payable under the certificate of a payment certifier and, accordingly, the comparable subsection in the new Act will encompass those fact situations which exist whenever a sum becomes payable regardless of whether or not there was a payment certifier. With these comments and keeping in mind that a trust is only created in the hands of contractors and subcontractors when a sum is "owing or received on account of the contract price", it is clear why this issue only arises with respect to the trust in the owner's hands. It can only arise in non-financing situations with respect to the owner due to the difficulty of describing those funds to which the trust will apply. The Committee was of the strong opinion that the mechanics' lien trust should not defeat the interests of sellers and lenders who had sold or financed goods the sale of which has generated money or like intangibles in the owner's hands. However, if the owner had granted a security interest on all of his personal property after the interest of the mechanics' lien trust arose then the interests of the beneficiaries of the trust should prevail. In this regard, the Committee felt that the way to achieve these dual objectives would be to confine the application of subsection 3(3) to the Crown and to when the owner financed the project out of his own resources. The second problem could be resolved by the law of trusts insofar as a security interest was granted after the trust was created. If a security interest was granted in personal property by the owner, in a non-financing situation (as would exist if the owner granted a security interest for past indebtedness) the legislation would provide no relief for the beneficiaries of the trust. The Committee was confident that this fact situation was so rare as to not warrant the complicated legislation necessary to secure its resolution in favour of trust beneficiaries.

Recommendations:

1. To ensure the minimum interference with sellers and lenders not associated with the improvement, the trust constituted of funds in the owner's hands in non-financing situations should be confined to when the owner provides his own capital and the Crown.

2. The legislation should not provide a solution to the priority conflict between secured parties financing personal property unrelated to the improvement and trust beneficiaries. This should be left to the common law.

The priority conflict between trust beneficiaries and assignees (categories (b) and (c) above) can be dealt with together. Although an argument can be made that assignees under an absolute transfer of contract proceeds who act in good faith, for value and without notice of the trust should defeat the trust beneficiaries on the basis of the lack of notice, the Committee did not accept this argument. The trust is statutorily created and, therefore, no one can plead ignorance of it: see Aetna Roofing (1965) Ltd. v. Robinson, [1971] 4 W.W.R. 191 (Man. Q.B.). Anyone taking an assignment of construction contract moneys must take same impressed with the trust. The courts have had no difficulty with this concept as evidenced by the Minneapolis Honeywell, supra, case, and the line of cases following it. In reviewing the legislation on this point the Committee was divided on whether the present statutory resolution of the problem should be maintained. Subsection 5(1) clearly grants priority to trust beneficiaries over assignments in whatever form, but given the Minneapolis-Honeywell decision, and cases like Modular Products Ltd. v. Aristocratic Plywoods Ltd. et al., [1974] 2 W.W.R. 90 (B.C.C.A.) which held that a mechanics' lien trust defeats demands under the Income Tax Act and the Excise Act, it is merely declaratory. Unlike the priority rules provided by section 25, which are required because there are no common law rules dealing with priority disputes between liens created by the Act and assignees and unsecured creditors, the priority rules contained in subsection 5(1) are merely a statement of the law and, probably, were never required. The continued presence of subsection 5(1) could be troublesome not because of what it does say but because of what may be missing. However, to eliminate this subsection is bound to spawn litigation in Saskatchewan on the effect of its repeal. To avoid this result the Committee resolved to maintain subsection 5(1) with the necessary changes to accommodate the changes in terminology brought about by The Personal Property Security Act but to eliminate the reference to the creation of the lien on the trust fund. The continued reference to the creation of a lien on the trust fund, which is without parallel in Canada, can only serve to confuse. Although it may have been added to strengthen the priority of trust beneficiaries it does not appear to be necessary given that its absence has not deleteriously affected the position of trust beneficiaries in other jurisdictions where it does not exist.

Recommendations:

1. The legislation should continue to provide a priority rule for conflicts between trust beneficiaries and assignees of the contract price.
2. The reference to the creation of the lien on the trust fund should be deleted.

Resolution of the priority conflict between trust beneficiaries and third party creditors of the trustee cannot be more difficult than where the third party is the banker to the trustee. In the general law of trusts it would be preposterous to suggest that a creditor, whether secured or unsecured, of a trustee could claim trust funds to satisfy a pre-existing indebtedness incurred against the trustee in another capacity. However, the Committee is also fully aware of the practical difficulty facing a bank, credit union or other financial institution with a client who has an overdraft or other debt and also a current account with money on deposit from many sources. The general position of the financial institution is simply described in the following quotes from Baxter's Law of Banking, 3rd edition beginning at page 33:

> In general, of course, the various principles of the common law systems as to recovery of trust funds, do not directly involve the bank, the obligations of which are based on the contract with the customer. But there is a general principle that if A holds property in a fiduciary capacity, for example, as a trustee or an agent, and B takes from A a transfer of the property "with knowledge of a breach of duty committed by him in making the transfer", the B holds the property "under a transmitted fiduciary obligation to account for it" to the cestui que trust or principal.

And again, at pages 34 and 35:

> It is difficult to deduce from the authorities really clear principles on which to determine whether or not a bank was privy to an unauthorized payment of trust money into a private bank account. There are two elements [which] reference [the] liability of a bank as a constructive trustee: (1) a dishonest or fraudulent design (which must be pleaded), and (2) actual knowledge or knowledge by constructive notice of such design. As to constructive notice: "If he wilfully shuts his eyes to dishonesty, or wilfully or recklessly fails to make such inquiries as an honest and reasonable man would make, he may be found to have involved himself in the fraudulent character of the design, or at any rate to be disentitled to rely on lack of actual knowledge of the design as a defence".

And at page 36:

> On the other hand, there is no general duty on a bank to act as a watchdog in regard to its customer's business and the possibility of a breach by the customer of a fiduciary duty.

The Mechanics' Lien Act does not contain any provisions which provide a priority rule in these circumstances, unless, somehow, the creation of the lien on the trust funds was added for this purpose. Since the meaning of this phrase is not readily apparent and there is no case law on it, and because there are many cases in favour of trust beneficiaries in jurisdictions where there is no lien on trust funds, it is the Committee's view that the presence or absence of these words is of no significance to the issue at hand. Saskatchewan is like Manitoba, Ontario, British Columbia and New Brunswick in not legislating a priority rule. The establishment of a priority rule has been left to the law of trusts.

Until recently, it could be said that there were two lines of authority explaining the bank's position. On the one hand, there is a line of authority beginning with John M. M. Troup Ltd. v. Royal Bank, [1962] S.C.R. 487. The facts of this case were that the general contractor's overdraft exceeded

$100,000. A cheque made payable to the general contractor by the owner was deposited. The bank was fully secured. The bank applied the amount of the cheque to the overdraft and subsequently released other securities which it held against the general contractor. The court found that the bank knew the cheque was part of the contract price and that it represented a substantial part of the holdback. The bank did not know of any unpaid accounts or of the financial difficulties of the customer. Judson, J. speaking for the majority said that on these facts, with an amply secured overdraft and no reason to press for payment, a bank does not participate in a breach of trust merely because it receives payment by a cheque drawn by a third party in favour of the customer and deposited in the customer's account. The general philosophy of the Troup decision has been followed in George W. Crothers Ltd. v. Bank of Nova Scotia, [1967] 1 O.R. 424 (Ont. C.A.); Banque Romande v. Mercantile Bank of Canada, [1971] 3 O.R. 433 (Ont. C.A.) affirmed 45 D.L.R. (3d) 480 (S.C.C.); Canadian Pittsburgh Industries Ltd. v. Bank of Nova Scotia (1962), 37 D.L.R. (2d) 120, (B.C.S.C.); Pilkington Glass Ltd. v. Canadian Imperial Bank of Commerce (1964), 46 W.W.R. 345 (B.C.S.C.); Ross v. Royal Bank, [1966] 1 O.R. 90 (Ont. H.C.).

On the other side there is a line of cases beginning with Fonthill Lumber Ltd. v. Bank of Montreal [1959] O.R. 451

(Ont. C.A.), and followed by Aetna Roofing (1965) Ltd. v. Robinson, [1971] 4 W.W.R. 191 (Man. Q.B.)and Andrea Schmidt Construction Ltd. v. Glatt (1979), 104 D.L.R. (3d) 130 (Ont. H.C.), affirmed 112 D.L.R. (3d) 371 (Ont. C.A.). These cases represent a philosophy whereby the courts were prepared to hold that the bank knew or ought to know of the breach of trust and that it had acted independently in the breach.

Recently, it would appear that the issue may have been resolved in a non-mechanics' lien case: Carl B. Potter Ltd. v. Mercantile Bank of Canada (1980), 112 D.L.R. (3d) 88 (S.C.C.). In this case the court was dealing with a cheque given to accompany a tender on the construction of a waste treatment plant. The terms of the performance guarantee were that the owner could cash the cheque of the successful bidder but was required to place the proceeds in a separate interest-bearing trust account. The vice-president of the bank met with the owner and the owner gave the cheque to the vice-president. Contrary to the terms of the performance guarantee the owner exchanged the cheque for an 18 day deposit certificate. When the 18 days were up the bank transferred the funds to the owner's collateral account and used the funds to meet the owner's obligations to the bank.

Ritchie, J. speaking for the majority held that the bank must have known that the cheques were subject to the terms of the trust. He makes this statement at page 90:

> Notwithstanding the fact that the exact terms of the performance guarantee may not have been known to the bankers, they must be taken to have known that their customer was contemplating the construction of a waste treatment plant and the presentation of the two cheques from construction companies was enough in my view to alert them to the nature of the transaction.

What is of general significance in this case is the elucidation by the court of the position of the bank which has been, in essence, put on the alert. At page 90, Ritchie, J. makes the following comment:

> The position of a banker who has been placed "on inquiry" in the manner aforesaid is summarized in the following brief paragraph from Halsbury's Laws of England, 4th ed., vol. 3, p. 48, para. 60:
>
> > A banker may be a constructive trustee of money in his customer's account and in breach of that trust if he pays the money away, even on the customer's mandate, in circumstances which put him upon inquiry.

This case has now been recently followed in the Ontario Supreme Court in the case of Perlmutter Shore Ltd. v. Bank of Montreal (1981), 40 C.B.R. (N.S.) 1 (Ont. S.C.). The court rationalized the Fonthill, supra and Troup, supra, cases by saying that in the Troup decision there was no suggestion that the bank had any knowledge of the accounts of the plaintiff. Eberle, J. makes this comment at page 11:

> In view of the decision in Carl B. Potter v. Mercantile Bank of Canada, supra, I do not think that the words of Porter C.J.O. can any longer be taken as establishing a minimum level of proof which must be met in all cases before a bank may be held liable for a breach of the s. 2 trust.

The reference to Porter, C.J.O. is a reference to the Troup decision. Chief Justice Porter gave the appellate decision which was agreed with by Cartwright, J. in the Supreme Court of Canada in the Troup decision.

It appeared to the Committee that this area of the law of trusts was being handled by the courts and that with the decisions in Carl B. Potter and Perlmutter Shore Ltd. any attempt to draft provisions could only further complicate the issues. If the Committee is correct that the law has now been stated by the Carl B. Potter decision then a lender, who asks himself whether or not he should properly apply money to a prior debt, is probably quite safe in assuming that he cannot.

The Committee received representation to the effect that a lender should not be liable for breach of trust when it applies money in a trustee's account to a pre-existing indebtedness unless the lender has actual notice of a lien claim and that the money is impressed with the trust. This is the same representation that was made to the Manitoba Law Reform Commission and like the Manitoba Commission, the Committee does not feel it is possible to accede to the request. If, as the Committee believes, the law has now been accurately and adequately stated by the Supreme Court of Canada, then a lender is liable when he has sufficient facts to be "put on inquiry".

Recommendation:

The legislation should not provide a priority rule to resolve the conflict between trust beneficiaries and the lender to the trustee where the lender applies funds on account to a prior indebtedness. The Committee felt that those questions had been answered by and should be left to the common law.

With respect to unsecured creditors acting pursuant to a judgment enforcement device, the only possible issue is whether money owing to a trustee but not received can be attached or is the money impressed with the trust. The view that money owed is not impressed with the trust is propounded by Castelein v. Boux, [1934] 3 D.L.R. 351 (Man. C.A.) which was followed in Mike's Roofing & Insulation Ltd. v. Harder (1965), 46 D.L.R. (2d) 595 (B.C. Co. Ct.). Although these cases are called into question by Beaver Lumber Company Ltd. v. Sieffert and Villeneuve (1964), 49 W.W.R. 294 (Man. Q.B.) and by all of those cases which now seem to attribute to the word "received" that it includes money that is owed, the Committee felt that the legislation should be drafted so as to ensure that money owed to a trustee is impressed with a trust. Subsection 5(1) in providing that the lien on the trust funds takes priority over all judgments, attachments, garnishments and receiving orders of the contract price or any portion of the price whenever received can then apply to ensure priority is given to the trust beneficiaries as against such creditors. Again, although this section may not be needed, the Committee, for the reasons already stated, has resolved to retain at least a modified version of subsection 5(1).

Recommendations:

1. Money owed to a trustee should be considered trust funds.
2. The legislation should provide a priority rule in favour of trust beneficiaries in competition with unsecured creditors claiming under judgment enforcement devices.

6. Does the expiry of the time to file a lien affect the trust beneficiaries' right to assert a claim:

   (a) against third parties dealing with the trustee?
   (b) with other trust beneficiaries who have registered liens?

These issues do not arise in the context of the present Act. Although section 36 provides time limits for the registration of a lien, subsection 37(2) provides that a lien may be registered after the expiration of the statutory period and it is valid except as against persons who acquire an estate, interest or charge on the land or against the owner or other person, who has made payment in good faith. If the recommendation of the Committee, to the effect that an absolute statutory lien period should be imposed, is accepted, it becomes necessary to consider the effect of the expiry of the lien period on the rights of trust beneficiaries.

In Minneapolis-Honeywell Regulator Co. Ltd. v. Empire Brass Manufacturing Company, [1955] S.C.R. 694, it was argued that when a potential lien claimant failed to file his lien within the time limited for filing, not only did the lien claimant lose the right of lien, he also lost the rights conferred upon him under the trust provision. Although the

Court of Appeal of British Columbia agreed with this view, the Supreme Court of Canada rejected this idea and held that the rights of the trust beneficiary are unimpaired by the lapse of the right to claim a lien. On the authority of this decision, the British Columbia Law Reform Commission recommended that: "the right to assert the existence of a trust should continue to be unaffected by the fact that the time limited for filing a lien has expired" (see B.C. Law Reform Commission Report, page 92).

The new Manitoba Act contains the following section:

> 9 The existence of a trust and a cause of action asserting the existence of a trust or any breach of trust under this Act are not affected by the fact that the time for filing a lien under this Act has expired.

The new Ontario Act contains no such provision. The second issue was first raised by the Ontario Discussion Draft which recommended the addition of a new section as follows:

> 88(1) All beneficiaries of the trust under Part II who have a lien have priority in the distribution of trust money over other beneficiaries of the trust.
>
> (2) Priority in the distribution of trust moneys between beneficiaries who have liens shall be in accordance with the priorities set out in this Part.

The commentary accompanying this proposed new section reads as follows at page 105 of the Discussion Draft:

> This section is new, but codifies the decision of the courts. The provision is another exception to the rule that all persons supplying services and materials to the same payer share rateably. The preservation and perfection of lien claims requires diligence by a claimant. It is only fair that those who have taken care to protect their interests should have priority over those who have not taken such steps.

The Ontario Committee Draft contains a somewhat similar section.

The new Ontario Act contains the following section:

> 87(1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien.
>
> (2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part.
>
> (3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved.

Thus it would appear that between the time the Ontario Committee submitted its report and the passage of the legislation it was decided to limit the establishment of priority among lien claimants to cases where the trustee is insolvent.

The Saskatchewan Committee had difficulty understanding section 88 of the Discussion Draft or section 87 of the Ontario Act. Is due diligence really a factor with respect to those funds in excess of the holdback? The Committee did not feel that there was any hardship imposed upon a trustee in deciding how to pay if some of the beneficiaries have registered mechanics' liens and some have not. As will be discussed in the context of the lien on land, there are procedures developed to prevent the trustee from being in breach of trust. With the law as established by the Minneapolis-Honeywell case, the fact that a claimant has not registered a lien does not affect his right to be a trust beneficiary and commence action. Accordingly, a trustee, who must resolve the problem of the lien, has the alternative of paying moneys into court to cover the lien, paying the lien claimant directly if the trustee is the owner or run the risk of contending with the lien later and pay all beneficiaries their proportionate shares. The trustee does so not because of the trust provisions but because of the provisions related to the lien on land. Generally, the Committee was opposed to the establishment of priority among lien claimants. Those lien claimants who most often fail to register liens, namely labourers, would be adversely affected by the creation of a priority among lien claimants.

The Committee did not perceive any benefit to the trustee under section 88 of the Discussion Draft or to the trustee's representative under section 87 of the new Ontario Act. The trustee or his representative still must ascertain the whole extent of the class.

Recommendation:

The expiry of the lien period should not affect a trust beneficiary's right to assert his claim against the trustee or a third party acting in breach of the trust nor should it create a priority among trust beneficiaries.

7. What should the limitation period be for the commencement of an action for breach of trust?

Subsection 8(2) of the present Act establishes the following limitation periods:

> 8(2) Subject to subsection (3) but otherwise notwithstanding anything in this Act, no action to assert a claim to trust moneys mentioned in the preceding sections shall be commenced except:
>
> (a) in the case of a claim by a contractor or subcontractor in cases not provided by clauses (b), (c) and (d) within one hundred and twenty days after the completion or abandonment of the contract or subcontract;
>
> (b) in the case of a claim for materials within 120 days after the supplying or furnishing of the last materials;
>
> (c) in the case of a claim for wages within 120 days after the last work was done for which the claim is made; or
>
> (d) in the case of a claim for services within 120 days after the last work was done for which the claim is made.

Subsection 8(3) provides that the lien holder may extend the period for commencing an action for a period not exceeding 60 days from the date of the expiration of the 120 day period mentioned in subsection (2) but the application to extend the time period must be made within the 120 days.

In the absence of subsection 8(2) the limitation period for commencing an action for civil breach of trust in Saskatchewan would be dependent upon subsection 43(2) of The Limitation of Actions Act which provides as follows:

> 43(2) In an action against a trustee or a person claiming through him except where the claim is founded upon any fraud or

> fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use:
>
> (a) all rights and privileges conferred by this Act shall be enjoyed in the same manner and to the same extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee;
>
> (b) if the action is brought to recover money or other property, and is one to which no limitation provision of this Act applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to the action in the same manner and to the same extent as if the claim had been against him in an action for money had and received; but no limitation provisions of this Act shall begin to run against a beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

The appropriate limitation period for the recovery of money is contained in clause 3(1)(f) of The Limitation of Actions Act which provides that actions for the recovery of money must commence within 6 years after the cause of action arose. In his text Law of Trusts in Canada, Dr. D.W.M. Waters discusses this trust provision at page 865:

> In general, therefore the trustee in Ontario [and most other jurisdictions in Canada including Saskatchewan] who has caused loss through a breach of trust which was

> nevertheless honest, such as a mistaken improper investment or a neglect to call in or collect trust funds, has a six year limitation protection. But the trustee who retains trust property improperly at the time of the action, the trustee who has employed the trust property for his own benefit, and the trustee who is personally guilty of fraud, have no limitation protection. Each continues to be liable without limit of time in accordance with the original equity conception of the trustee's liability.

In the other jurisdictions in Canada which employ the trust concept, other than Manitoba and Ontario which will be discussed separately, no limitation period exists in the appropriate mechanics' lien legislation. Each jurisdiction must rely on the limitation period which exists in The Limitation of Actions Act which, by and large, is as outlined above.

Prior to the passage of the Manitoba Builders' Liens Act, there was no limitation on the time period for the commencement of an action for a breach of trust in Manitoba except as outlined in the Manitoba Limitation of Actions Act. The Manitoba Law Reform Commission in its report at page 41 discusses the appropriate time limit:

> In determining an appropriate time limit for asserting claims to trust moneys we consider the following:
>
> 1. the recommendation of our consultant;

> 2. the Ontario legislation;
> 3. the Nova Scotia report;
> 4. the fact that it often takes considerable time to discover whether or not there has been a breach of trust;
> 5. the fact that construction projects can last upwards of 2 years;
> 6. the fact that litigation ensuing out of such projects can last even longer;
> 7. the desire to protect legitimate claims and in turn to deter breaches of trust;
>
> and finally
>
> 8. the fundamental purpose of the legislation, which is to protect claimants under the Act.
>
> Having considered each of these factors, we have concluded that the limitation period should be 6 months from the date the person became aware of the breach of trust. In our view, the onus should be on those persons having knowledge of the breach, to bring on the action as quickly as possible.

The Manitoba commissioners considered and rejected the possibility of establishing a special period of limitation for claims to trust moneys against a lender.

The section resulting from the Manitoba Law Reform Commission dealing with a limitation period for the commencement of an action for trust is as follows:

> 8. No action to assert any claim to moneys constituting a trust under section 4 or 5 shall be commenced after the expiry of 180 days after the date upon which the person bringing the action first became aware of the breach of trust.

In Ontario, prior to the enactment of the present Construction Lien Act, section 4 of The Mechanics' Lien Act provided that no action to assert any claim to trust moneys shall be commenced against a lender of money to a person upon whom a trust is imposed except within 9 months after the completion or abandonment of the contract or subcontract or in the case of a claim for materials or services or wages within 9 months after the placing or furnishing of the last material, services or after the last work was done for which the claim for wages is made.

In the Ontario Discussion Draft, the recommendation was made to provide that "no proceeding to assert a claim to any trust fund shall be brought later than one year after the payment upon which the claim is made became due". This new provision was rationalized on the basis that if a limitation period is necessary to give certainty to lenders it is also necessary to establish a special limitation period for other players in the construction industry. A special limitation period was felt to be justified on the basis that unlike many types of trusts, where a trust under The Mechanics' Lien Act is breached, it will usually be quickly discovered. The trust is discharged by making payment. If payment is not made then the beneficiary knows quite quickly that he must take steps to protect himself.

When this provision was considered by the special Committee established by the Ontario Attorney General, the resulting report contains, at page 46, the following comment:

> Section 14 of the Discussion Draft was designed to replace section 4 of the Mechanics' Lien Act. The section created a 1 year limitation period within which proceedings to assert a claim to any trust had to be brought. It replaced the 9 month limitation period contained in section 4 of the Mechanics' Lien Act, which applied only to applications against banks and other lending institutions.
>
> In the opinion of the Committee, no claim arising from a breach of trust should be barred by a special limitation period. The ordinary limitation periods, as well as the equitable doctrine of laches, should apply to such claims. In these circumstances, there should be no special exemption for banks and other financial institutions.

The Committee felt that the present limitation period contained in the Saskatchewan Mechanics' Lien Act was inadequate. Section 8 presently eliminates the ability to commence an action on a trust but it does not terminate the trust. An issue can then arise as to whether or not the trustee can pay out claims for which an action cannot be commenced in the same way as he pays out claims which still can be the subject-matter of a suit against him or if he does so will this make him in breach of trust to this latter group of claimants.

Furthermore, the time period is extremely short and often the significance of the breach is not discovered until after the period has expired. Again, the time periods vary depending on the nature of the beneficiary which results in different limitation periods for different segments of the construction project. The Committee also felt that the limitation period provided in The Limitation of Actions Act left much to be desired in terms of certainty. Although the significance of a limitation period is reduced if the recommendation that the trustee be discharged upon payment to his beneficiaries is accepted, the Committee felt that trustees and beneficiaries, alike, should know the outer time limits of their respective obligations and rights. The Committee was also of the opinion that a time period that was dependent upon knowledge alone did not meet this criteria. Beneficiaries must be diligent in the enforcement of their rights and it was agreed that a time period of one year should be sufficient to enable this diligence to be exercised. In determining the point at which the limitation period would commence, the Committee felt that the points of reference for the purpose of determining when the right to lien has expired should also be the points of reference for determining when time begins to run for the purposes of commencing a trust action.

Recommendations:

1. The legislation should provide a time at the end of which the trust created by The Mechanics' Lien Act is terminated and also a time, the expiry of which, would preclude the commencement of action.

2. The limitation period to meet the requirements set out above should be 1 year after a certificate of substantial performance has been given or the contract is completed or abandoned, whichever first occurs.

8. Whether the Act should make directors of a corporate trustee personally liable for a breach of trust?

This issue is raised by the new Ontario Construction Lien Act. The Ontario government opted for a section which would allow a beneficiary of a mechanics' lien trust to sue the directors and other controlling officers for civil breach of trust where such a director or officer "assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation", (Ontario, s.13). This section was designed to replace a penal section created by the province allowing quasi-criminal prosecutions for breach of trust. It reads as follows:

> 13(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
>
> (a) every director or officer of a corporation; and
>
> (b) any person, including an employee or agent of the corporation, who has effective control of the corporation or its relevant activities,
>
> who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.
>
> (2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.
>
> (3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable.
>
> (4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution of indemnity as the court considers appropriate in the circumstances.

The justification for this section is outlined at pages 44 and 45 of the Ontario Committee Draft. Apparently, the section was inserted:

> ...to prevent the use of a shell corporation as a device for defrauding creditors. The

> use of such a corporation presents a problem in some segments of the construction industry. Section 13 allows the court to disregard the limited liability of a corporation, and to impose liability upon those who are actually responsible for a breach of trust. The words "assents to or acquiesces in" in subsection (1) are intended to convey that only those who had the power to prevent a breach of trust are to be found liable under this section.

The law in Canada, at least in British Columbia and Ontario, appears to recognize a cause of action against directors who participate, either knowingly or negligently, in a breach of trust by their company. As early as 1958, the British Columbia Supreme Court held, in the case of Scott v. Riehl (1958), 25 W.W.R. 525, that a director who causes his company to commit a fraudulent breach of trust from which he benefits is liable to the owner as a beneficiary of the trust. The basis of the decision lies in the law of agency and the law of trust. Subsequently, the same court found officers and directors of a company liable to a supplier for breach of trust in Horsman Brothers Holding Ltd. v. Panton, [1976] 3 W.W.R. 745. At page 750, the court said:

> If a person deals with the funds, which are within the meaning of s. 3, in a manner inconsistent with the trust, he breaches the trust, even though he may do so "innocently".

The Ontario High Court of Justice approved and followed both of these decisions in Andrea Schmidt Construction Ltd. v. Glatt et al (1979), 104 D.L.R. (3d) 130. This decision was affirmed without reasons by the Ontario Court of Appeal, which decision is reported at 112 D.L.R. (3d) 371. The British Columbia courts continue to apply the earlier decisions. In fact, in the most recent case of B.C. Ventilating Ltd. v. Intercontinental Environmental Control Ltd. (1977), 3 B.C.L.R. 89, the British Columbia Supreme Court held two directors of a corporate defendant jointly and severally liable along with the corporate defendant for diverting trust moneys with very little comment as to whether or not the corporate veil could be pierced in these circumstances.

The Committee considered whether a provision like section 13 of the Ontario Construction Lien Act should be added to the proposed Act or whether the law should be allowed to evolve following the line of cases having as their root the British Columbia Supreme Court decision in Scott v. Riehl, supra.

The arguments for inclusion of such a section are that the officers of corporate trustees can be expected to be familiar with the statute but not with the common law. Similarly, lawyers acting for beneficiaries will more readily be able to determine that yet another remedy exists to enable the recovery of trust money. On the other side, its inclusion may stop the development of the common law in this area. It may be argued that section 13 does not go far enough and that it should include officers of corporations who participate in a breach of trust regardless of whether or not the corporation is constituted a trustee. On balance, the Committee felt that the potential benefits to be gained from such a section outweighed any perceived detriment.

Recommendation:

A provision similar to Ontario's section 13 should be included in the new Act to make directors of a corporate trustee personally liable for a breach of trust.

9. Whether provincial criminal sanctions should be retained allowing prosecution against trustees and directors of corporate trustees?

As part of the comprehensive trust provisions implemented in 1973, the Saskatchewan Mechanics' Lien Act contained this section:

> 6(1) A person upon whom a trust is imposed by section 3 or 4 who appropriates or converts any part of the trust money referred to in section 3 or 4 to his own use or to any use not authorized by the trust is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or both fine and imprisonment; and every director or officer of a corporation who assents to or acquiesces in any such offence by the corporation is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than two years or both fine and imprisonment whether or not the corporation has been prosecuted or convicted of the offence.
>
> (2) No prosecution shall be instituted under subsection (1) without the consent in writing of the Attorney General.

In chapter 61 of the Statutes of Saskatchewan 1973-74 the word "knowingly" was inserted after the word "who" in the second and eighth lines of subsection 6(1). This amendment, although assented to on March 28, 1974, was made retroactively effective to September 1, 1973, the day when the new Act came into effect.

Prior to the recent activity in Manitoba and Ontario, British Columbia, New Brunswick, and Ontario shared with Saskatchewan the same penal section. Although Manitoba had the first trust provision in Canada, it was not until the new Builders' Liens Act was passed that Manitoba introduced a quasi-criminal offence for breach of trust as follows:

> 7 Every person upon whom a trust is imposed by section 4, 5 or 6 who knowingly appropriates or converts any moneys constituting a trust under those sections to or for his own use or to or for any use not authorized by the trust is guilty of an offence and liable, on summary conviction, to a fine of not more than $50,000.00 or to imprisonment for a term of not more than 2 years, or to both such fine and such imprisonment and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this section is, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to a similar penalty.

As discussed above, Ontario decided to eliminate its penal section on the basis that section 296 of the Criminal Code could form the basis of any prosecution involving an intent to defraud. For those transactions not involving this mental element, the beneficiaries of the trust could commence action against the trustee or any third party participating in a breach.

Section 296 of the Criminal Code reads as follows:

> 296 Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in violation of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and is liable to imprisonment for fourteen years.

"Trustee" is defined as follows:

> "Trustee" means a person who is declared by any Act to be a trustee or is by the law of the province, a trustee and without restricting the generality of the foregoing, includes a trustee on an express trust created by deed, will or instrument in writing, or by parol;

This section has been used successfully as the foundation of a prosecution for breach of a mechanics' lien trust in several cases including a recent unreported decision of His Honour Judge E.R. Gosselin, P.C.J.: R. v. Cameron, February 23, 1982, given at Tisdale, Saskatchewan. The Supreme Court of Canada has yet to hear an appeal from the Ontario Court of Appeal's affirmation of the County Court Judges Criminal Court decision in R. v. Rosen reported at (1979), 55 C.C.C. (2d) 342, which also successfully relied on the trust created by the Ontario Mechanics' Lien Act to prosecute under section 296 of the Criminal Code.

The argument against inclusion of an offence section is that it is overkill. The Criminal Code is adequate to cover all criminal breaches of trust or breaches where there is an intent to defraud. Secondly, to be able to prosecute where there is no intent to defraud, it can be argued, is a method of debt collection. However, the Committee felt that the inclusion of such a section was a further legislative statement that trust funds are not to be diverted for purposes inconsistent with the trust. In this regard the Committee adopted the reasoning of LeBel, J. in the decision of Bank of Montreal v. Sidney, [1955] O.W.N. 581 (Ont. H.C.), where it was argued that since the remedy for the breach of trust contained in the Act was stated to be of a criminal nature that no civil consequences should flow from it. LeBel, J. rejected this argument and stated: "the abuse it seeks to remedy is made even clearer by the recent addition of" the penal subsection. There may be cases where the Crown feels a prosecution is warranted but cannot prove an intent to defraud. In these cases, the Crown should be provided with the legislative ammunition to proceed. As to the constitutional validity of a criminal section for breach of trust when a section also exists at the federal level, the Committee felt that this issue had been decided by the British Columbia Court of Appeal in R. v. Brunner (1960), 32 W.W.R. 478, which court upheld a conviction for breach of trust under the Mechanics' Lien Act. Although this decision was based on a provision which did not contain the qualifier "knowingly", the Committee felt that the addition of this word would not have materially affected the result in the Brunner decision. Although at one time there could have been an argument made with respect to the constitutional validity of this section, the Committee sought and received the opinion of a noted constitutional lawyer who gave the opinion that the proposed section would be held to be valid provincial legislation that is not superseded or rendered inoperative by section 296 of the Criminal Code. This is born out by the cases of R. v. Brunner, supra, and R. v. Serdom Construction Ltd, [1983] 3 W.W.R. 318 (Man. P.C.). This latter decision was based on the new Builders' Liens Act in Manitoba.

On balance, on this issue, the Committee agreed with the views expressed by Mr. David I. Bristow, Q.C., in "Criminal Prosecutions under the Mechanics' Lien Act", Chitty's Law Journal, 1963-64, volume 12, page 197 at 199 where the following comment appears:

> The unscrupulous and dishonest contractor has been allowed to spawn too long in the building industry and will continue to propagate unless new laws are enacted or the existing laws utilized to combat and restrain him. It is respectfully submitted that before new legislation is enacted the existing provisions already in the statute be acted upon, and with the Brunner case as a guide, that prosecution be launched in Ontario under the penal section of the Mechanics' Lien Act at least as a starting point toward the ultimate removal of this type of contractor from Canada's greatest single industry.

In reviewing the present criminal section, the Committee was of the opinion that the fine should be increased and felt that the figure of $50,000 adopted by Manitoba should also be adopted for Saskatchewan. On the basis of further submissions made to it, following the release of the "Tentative Proposals" the Committee also felt that the time period for commencing a prosecution should be extended to two years. In many construction projects the fact of the breach may not surface until some time after its occurrence and, if the Committee's overall recommendation is to have any effect, it must be possible to prosecute breaches of trust which only come to the knowledge of the authorities within at least two years after the breach.

Recommendation

The Act should retain an offence section for breach of trust in substantially the same form as presently exists with the fine provision increased to $50,000 and the time for commencing a prosecution increased to two years.

PART II

II. THE LIEN

General

The lien is created in Saskatchewan by the following subsections taken from The Mechanics' Lien Act:

> 12(1) Any person who does or causes any work to be done or services rendered upon or in respect of an improvement or furnishes any material to be used in or on an improvement for an owner, contractor or subcontractor has, except as otherwise provided in this Act, a lien upon the estate or interest of the owner in the land occupied by the improvement or enjoyed therewith for so much of the price of the work, services or material as remains owing to him.
>
> 19(2) Every lien is a charge upon the amount directed to be retained by subsection (1) [of section 19] in favour of the lienholders whose liens are derived under the persons to whom the moneys so required to be retained are respectively payable.

Placed one after the other these subsections seem rather confusing. Subsection 12(1) says there is a lien on land and then subsection 19(2) provides that every lien is a charge on the holdback. There are two liens created, but only in a special sense. The lienholder has a charge on the holdback which is his security for unpaid amounts. The intention is that if the holdback is retained and distributed in accordance with the Act, the lienholder has no further right to the land. In the event that the holdback is not retained, the lienholder is given the right to proceed against the land. Primarily, this part of the Report will be dealing with the lien as distinct from the holdback. Discussion of the holdback, its amount and distribution, is confined to the next Part of the Report.

1. Who is entitled to a lien?

This question is linked to several defined words contained in subsection 12(1): "person", "work", "services", "materials", and "improvement". "Person" is defined by section 2 to include associations and partnerships. The Committee noted that Saskatchewan, British Columbia, and Prince Edward Island are the only common law Canadian jurisdictions which grant a lien to unincorporated bodies. The difficulty this creates is that these bodies are not legal entities for the purposes of holding land. When an unincorporated association registers a lien, the only way it can be removed, in most cases, is by activating the notice to lapse procedure or, if this is not appropriate, by court order. The land titles offices cannot know whether the person signing the discharge is the only person who is benefitted by the lien. This creates hardships for owners and lien claimants, alike. The alternative is to require the individuals who formed the association or partnership to claim, and to confine the definition of person to bodies corporate and the Crown.

The Committee noted that in the case of Waisman, Ross & Associates v. Crown Trust Company (1970), 72 W.W.R. 531 (S.C.C.) the court found a claim by an architectural firm to be valid without any discussion of the definition of "person".

Recommendation:

The definition of "person" should be changed to include only the Crown and bodies corporate.

The Committee received a submission from each of the Saskatchewan Association of Architects, the Association of Professional Engineers for Saskatchewan, and the Association of Consulting Engineers of Saskatchewan, requesting that architects and engineers providing professional services be excluded from the umbrella of the Act.

The case law on whether an architect or an engineer is entitled to a lien varies from jurisdiction to jurisdiction. Some courts draw a distinction between the preparation of plans and supervision of projects by allowing a lien for the former only if the architect has also been engaged in supervision: see Nova Scotia Sand and Gravel Ltd. v. Kidstone Estates Ltd. (1973), 13 N.S.R. (2d) 431 (N.S. Co. Ct.), Malkin v. Guerra et al., [1979] 1 W.W.R. 164 (Man. Co. Ct.) and Rasmussens' Limited et al., v. Melville Country Club et al., [1977] 4 W.W.R. 382 (Sask. D.C.) (engineer's fees for supervision proper subject of lien claim). In P.R. Collings & Associates Ltd. v. Jolin Holdings Ltd., [1978] 3 W.W.R. 602 (Sask. D.C.), His Honour Judge Walker considered the position of a construction consulting company which had conducted a survey for the construction of a shopping mall, done some gravel filling and bored some test holes when it was decided that the shopping mall would not be built. After affirming the position of Ritchie, J. in Clarkson Co. Ltd. v. Ace Lumber Ltd., [1963] S.C.R. 110 at 114 who held that The Mechanics' Lien Act must be given a strict interpretation in determining whether any person is entitled to a lien, Judge Walker concluded that Saskatchewan by its definition of improvement required the construction of some "thing" or participation in specific listed activities: clearing, breaking, etc.. His Honour also approved the decision of Hett v. Samoth Realty Projects Ltd. (1977), 76

D.L.R. (3d) 362 (Alta. C.A.) where the Court held that there was no lien for construction management services, and, quoting from the Hett case, made the following comments at page 615:

> Although it is clear that services need not be physically performed upon the improvement to fall within the meaning of the Act they must in my judgment be directly related to the process of construction. Surely inspiration, the development of concepts, logistics, applications for zoning, legal services, or accounting services, do not fall within "services upon the improvement" as those words are defined by the case law....
>
> Unless some limit is put upon the meaning of "services" in the Act it would be open to any person, such as a lawyer, an accountant, a sociologist, or a statistician, whose work contributed in any way to the total project to file a lien under the Act. This result is certainly not the intent of the Act nor does it stand the test of strict interpretation.

The British Columbia Law Reform Commission recommended that architects and engineers should be included within the range of persons able to claim a lien regardless of whether the project is commenced. The Manitoba Law Reform Commission made a similar recommendation. Despite this recommendation, the Manitoba Act contains the following section:

> 36 Notwithstanding any other provision of this Act, an architect or engineer retained by an owner, contractor or sub-contractor under an agreement, which does not create

> the relationship of employer and employee, to provide architectural or engineering services in respect of construction or improving land
>
> > (a) does not have a lien or a claim for lien against or in respect of the structure or land or the land on which the structure is constructed for his professional fees and charges; and
> >
> > (b) is not a contractor, sub-contractor or worker for the purposes of this Act;
>
> and this Act does not apply to the agreement under which the architect or engineer is retained or to the recovery of his professional fees and charges.

The new Ontario Act contains the following:

> 3(3) Despite section 14(1), an architect or the holder of a certificate of practice under the Architects Act and the employees thereof do not have a lien.

The reference to employees of architects was added by a recent amendment.

The Committee felt that, insofar as the Act currently may provide for a lien for architectural and professional services, the Legislature should accede to the request of the professional associations to make it clear that their members cannot be lien claimants under the Act. The only question which remains is how best to give this exemption. Ontario exempts any architect or any person holding a certificate of architectural practice. Manitoba limits the exemption to those architects and engineers not in an employee - employer relationship and retained under an agreement to provide architectural or engineering services.

The Manitoba section is the more comprehensive provision. Only those persons who provide services or materials to an improvement for an owner, contractor or subcontractor are able to claim a lien (see section 12 of the existing Saskatchewan Act). By declaring that an architect or engineer providing architectural or engineering services is not a contractor or subcontractor, it is clear that a labourer, consultant or subcontractor employed or retained by an architect or engineer cannot claim a lien. The Committee felt that if its recommendation to exempt architects and engineers was accepted, the Act must also provide that no one employed or retained by an architect or engineer can claim a lien.

A problem that arises with the Ontario section is that if the architect is acting as a general contractor or in some other capacity on the construction project, his employees would not be entitled to a lien whereas the intent is that if the architect is providing architectural services he and his employees cannot lien. This will be a more complex issue in

Saskatchewan because in Ontario only the architects wanted to ensure non-application of the Act. As indicated professional engineers would also like to be exempted from the Act in Saskatchewan.

The definitional issue is the most difficult one. To what architects and engineers will the Act not apply? In Saskatchewan, many architects and engineers have incorporated. The following is a potential list of those persons to be exempted:

(a) a member of the Association of Professional Engineers of Saskatchewan practising professional engineering as that phrase is defined in The Engineering Profession Act;

(b) a partnership, association or corporation holding a certificate of authorization to practise professional engineering under section 7 of The Engineering Profession Act practising professional engineering as that phrase is defined in The Engineering Profession Act;

(c) a registered architect registered under The Architects Act;

(d) a corporation licensed to practise architecture under the bylaws of the Saskatchewan Association of Architects.

If the exemption for engineers is confined to those persons practising professional engineering as that phrase is defined in The Engineering Profession Act many potential issues may be avoided. That definition is as follows:

> 2(h) "professional engineering" or "the practice of professional engineering" means reporting on, advising on, valuing, measuring for, laying out, designing, directing, constructing or inspecting any of the works or processes set forth in schedule A, or such works or processes omitted therefrom as are similar to those set forth therein by reason of their requiring the skilled application of the principles of mathematics, physics, mechanics, aeronautics, hydraulics, electricity, chemistry or geology in their development and attainment; and includes such reporting, advising, valuing, measuring for, laying out, designing, directing, constructing or inspecting by any person under the general supervision of a professional engineer; but does not include the execution or supervision of works as contractor, foreman, superintendent, inspector, road master, superintendent of maintenance, technical assistant, student or engineer in training where the work has been designed by and is done under the responsible supervision of a professional engineer;

A comparable definition of practice of architecture appears in The Architects Act:

> 2(g) "practice of architecture" or "architecture" includes any single act or series of acts in:
>
> (i) the planning, designing, improving or supervision of; or

> (ii) the supplying of plans, drawings or specifications for the erection, construction, enlargement, improvement or alteration of;
>
> buildings of any kind or nature or any part or parts thereof, for hire, gain or hope of reward;

Following release of its first proposals, the Committee thought that the use of these definitions may unduly restrict the Court requiring it to delve into matters perhaps extraneous to the action as a whole. The definition of professional engineering may have unduly hampered that profession from continuing to evolve. The purpose for which that definition was developed is different from the purpose it would be required to serve in The Mechanics' Lien Act. The Committee felt that a reference to architectural or engineering services may be more readily understood and applied. It would also ensure that, in the event that an engineer or architect stepped outside the boundaries of his profession, his services would be the subject of a lien and his employees and any one retained by him would be protected.

Recommendation:

The Act should declare that an architect or engineer, or an employee of an architect or engineer, who provides architectural or engineering services upon or in respect of an improvement does not have a lien for such architectural or engineering services and is not a contractor or subcontractor.

Other agencies performing real estate appraisal work or selling real estate submitted briefs indicating a desire to come within the ambit of the Act. The Committee felt that the Act should be confined to the protection of those working in the construction and like industries which improve land but because of the basic construction model, discussed in the introduction to this Report, cannot rely on contractual remedies for their recourse.

Recommendation

The Act should not make real estate commissions or appraisal fees lienable interests.

The present Saskatchewan definitions of "work", "services", and "materials" are as follows:

> (a) "work" includes the doing of work and the performance of services upon or in respect of an improvement and also includes the breaking of any land or the clearing of timber or scrub;
> (b) "services" includes the use of equipment leased by a person to an owner, contractor or subcontractor in connection with an improvement, to the extent of the fair and reasonable value of the use of the equipment, and includes the wages of any operator provided with the equipment;

> (c) "material" or "materials" includes every kind of movable property.

It can be seen that the definition of "work" and "services" overlap and the definition of "materials" is not too helpful. The Committee received a number of requests to provide for a definition of materials. The Committee was impressed with the reworking of these definitions undertaken by Ontario which resulted in a collapsing of the definitions of "work" and "services" and a definition of "materials" which is more in accordance with the case law.

Recommendation

The definitions of work, services and materials should be redrafted.

The Saskatchewan definition of "improvement" is as follows:

> 2(d) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to be or become part of the land and includes clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, upon or under land.

Before the new Manitoba Act was passed only British Columbia and Saskatchewan allowed a lien for "clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, upon or under land". The new Manitoba definition, arguably, expands the right to lien to landscaping:

> 1 "improving land" means the doing of any work which improves the character of the land and without limiting the generality of the foregoing includes
>
> (i) clearing the land of timber or scrub,
> (ii) landscaping the land,
> (iii) fencing the land, and
> (iv) demolishing structures on the land,
>
> but does not include tilling, seeding, cultivating or mowing the land for agricultural or forest production or the harvesting of a crop from the land or the cutting of timber from the land for sale.

In Ontario, it is clear that the intention of the Legislature was to confine the application of the Act to the construction and repair industries:

> 2.8. "improvement" means,
>
> (i) any alteration, addition or repair to, or
> (ii) any construction, erection or installation on,
>
> any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning.

Although British Columbia and Saskatchewan appear to be unique in extending the Act to "outdoor" industries, the Committee is not aware of any problems with the application of the Act to "clearing, breaking, etc.". Furthermore, it was the Committee's view that the definition of improvement should be as broad as possible to prevent a lien from failing for any technical argument. Accordingly, the Committee does not propose any changes in this regard. As the question of landscaping and demolition easily can become the subject matter of litigation and since these are similar to other services mentioned in the definition, the Committee resolved to extend the Act to encompass these services.

The Committee noted the case of Rupert Reinforcing Ltd. v. World Wide Connections et al., [1980] 4 W.W.R. 458 (B.C. Co. Ct.) which held that "demolition" is encompassed in the word "alteration".

The Committee did not know why the Legislature felt constrained to state that an improvement was not "a thing that is not affixed to the land or intended to be or become part of the land" when the definition of it confines the application of the Act to land, but, again, as the addition of these declaratory words do not appear to create a problem, they were retained.

Recommendation:

The present definition of "improvement" should be redrafted and further expanded to include demolition and removal of any structure and landscaping.

2. Whether the lien as it relates to the landlord's interest can be made more effective?

Saskatchewan currently provides for a lien on the estate of the landlord in the following circumstances:

> 17(2) Where the interest or estate charged by the lien is leasehold the land itself may also with the consent of the owner thereof be subject to the lien provided the consent is attested by the signature of the owner upon the claim of lien at the time of registration thereof and duly verified.

This provision was criticized by the Thomson Report, at pages 33 and 34:

> I have never known of a case in which an owner has ever signed a consent endorsed on a claim of lien to be registered against his land. I have questioned various counsel and none of them could remember any such case. The consent of the landlord should really be obtained before any work is done or materials are furnished. It is very

> unlikely that he will sign a consent endorsed on the claim of lien after the work has been done or the materials have been furnished if he knows that the lien is going to be registered as an encumbrance against his property. In my opinion this subsection is not used nor is it likely to be used if left in the Act. It therefore serves no useful purpose. Some such provision as this was contained in the earlier Acts but more workable provisions are to be found in the Acts of those provinces which have revised their statutes in more recent years. In drafting section 9 of the revision I have followed rather closely the corresponding section of the Ontario and Alberta Acts.

The section 9 proposed by His Honour Judge Thomson was as follows:

> Where the estate or interest upon which a lien attaches is leasehold, then, if the person doing the work or furnishing the material gives to the person holding the fee simple or his agent notice in writing, referring to this section, of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or his agent, within ten days after the receipt of the notice gives notice that he will not be responsible for the cost of the doing of the work or the furnishing of the materials.

This recommendation was not adopted.

The criticism voiced by His Honour Judge Thomson continues to be valid today. The tenant engages the services of contractors, etc., who improve the land. The improvement becomes a fixture, and in most leases, becomes the property of the landlord on reversion of the lease, but the landlord assumes no responsibility for the payment of the construction of the improvement. As between the owner and the lessee, this is a satisfactory result because of the terms of the lease, but as between the owner and the lien claimants, it is not in keeping with the general objectives of the Act.

Two other criticisms may be made of subsection 17(2). It does not address the position of the lessee under a sub-lease and it does not specify the amount of the liability of the landlord; i.e., is his liability limited to the deficiency in the holdback or is he liable to the same extent as the lessee? From the landlord's perspective it must be said that if the improvements are not complete or are tailored to the needs of a particular tenant the improvements may not be worth their true dollar value.

It is instructive to examine the position elsewhere. In British Columbia, section 14 of the Builders Lien Act provides that all improvements done with the knowledge, but not at the request, of the owner shall be deemed to have been done at the owner's request. This does not apply to improvements made after there has been posted on at least two conspicuous places upon the land or upon the improvements, by the owner, a notice in writing that he will not be responsible for the improvements, or after actual notice in writing to the like effect has reached the person claiming a lien under the Act.

Ontario addresses the problems above by subjecting the estate of the "landlord" (this would include the owner or prior lessee) to the lien to the same extent as the lessee where the landlord does not deny the responsibility within fifteen days following receipt of a written notice of the fact of the improvement to be made (Ontario, section 19). Forfeiture of the lease for non-payment of the rent terminates the lien but any lienholder may prevent forfeiture by payment of the rent due.

Manitoba subjects the landlord's interest to the lien to the extent of the value of the holdbacks, in any case where the lessee is required to do the work giving rise to the lien by the terms of the lease or the landlord has consented to the work and the work was for "the direct benefit" of the landlord, (Manitoba, section 18).

It must be kept in mind that at this point we are discussing the position of the landlord who is not himself an "owner" within the meaning of the Act. Of course, if the landlord has directed the work or otherwise comes within the definition of "owner", then one does not need to consider this issue: see Daon Development Corporation v. Bahrey's Glass Ltd. (1982), 19 Alta. L.R. (2d) 41 (Q.B.).

On balance, the Committee favoured an approach which would see the landlord liable if he consented to the construction of the improvement. The consent that is contemplated is a consent with the terms and implications of The Mechanics' Lien Act in mind. This would give the landlord the opportunity to assess the viability of the improvement. The Committee did not like a mechanism which would presume consent if the landlord failed to respond to service of a notice or if the tenant was contractually bound to proceed with the improvement. In a system where the landlord had actually given his consent, it is possible to provide that forfeiture of the lease, for whatever reason, does not affect the lien on the lessee's interest or the landlord's interest. If the landlord can terminate the lien for non-payment of rent, in most cases there would be no purpose served by creating the lien. In those cases where it is necessary to have recourse to the land the tenant will have failed to pay his rent. Furthermore, to have the lien fail for non-payment of rent makes it attractive for a landlord and tenant to collude to ensure the rent is not paid.

Where the landlord has not consented the lienholders proceed at their peril. If the landlord has not consented, forfeiture of the lease will seriously undermine the position of lienholders.

Recommendations:

1. The interest of a landlord should also be charged with the lien where he has consented to the improvement for the purposes of The Mechanics' Lien Act.
2. Where the landlord has consented to the improvement, forfeiture of the lease, for whatever reason, should not affect the lien on the lessee's or landlord's interest.

3. When should the interest of a co-owner be charged by a lien?

Section 16 of the Saskatchewan Act deems an owner to be acting as agent for his spouse who has an interest in the land if the improvement is made "with the privity" of that spouse. This presumption only applies to that portion of the work completed before the "person doing the work, rendering the services or furnishing the materials" has had actual notice that the owner is not the agent of the spouse. This is a very difficult section to interpret. When is work done "with the privity" of someone? If it is when they have consented then why is the section necessary? An illustration of how a Saskatchewan court would determine when a joint tenant's interest is charged is the case of Tripp v. Gray (1979), 27 C.B.R. (N.S.) 176 (Sask. D.C.) where the court, without reference to section 16, gave priority to mechanics' liens over the interest of the spouse who had not engaged the contractors.

The Committee felt that the result achieved in the Tripp v. Gray case was the correct one, and that the section should be extended to all co-owners. Only if the co-owner indicates that he takes no financial responsibility for the improvement should he not be impressed with liability. The Committee felt that the co-owner should give written notice to the contractor if the co-owner takes no financial responsibility for the improvement and that a time limit of ten days from the commencement of the improvement should be imposed.

Recommendation:

The interest of a co-owner should also be charged by a lien unless the contractor is given written notice, within ten days after the first lien arises, that the co-owner assumes no responsibility for the improvement.

4. When an owner contracts for improvements to several parcels of land under one contract, should provision be made to allow a lienholder to have a general lien against all parcels to the full amount of the lien?

The briefs received from the Saskatchewan Construction Association and HUDAC pointed out the problem of proof confronting a materialman or labourer when providing work and material on a construction project improving more than one parcel of land. In order to be entitled to a lien, a lien claimant must be able to prove that he provided work, services, or materials to specifically described land. Where a contractor is providing work for an owner and engaging labourers and materialmen, it is very difficult for these lien claimants to prove actual incorporation into an improvement and the value of the work and materials provided to a particular site. One means of alleviating this problem is to allow a lien claimant to have his lien follow the contract between the owner and contractor in form. Thus, if there is one contract and one subcontract of supply, a lienholder could be allowed to claim his whole lien against each parcel of land which is improved under that contract. Ontario has developed a section to accomplish this objective as follows:

> 20 Where an owner enters into a single contract for improvements on more than one

> premises owned by him, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials he supplied to all the premises.

The potential hardship which is created by this section could be in relation to the priority position of other lien claimants who can prove for specific amounts in relation to particular property. This can be rectified by providing for equal apportionment of the general lien among the total premises improved by the lien at a point where there must be a forced distribution of the holdback by the court. After all other lien claimants are paid, the general lien claimant can then be paid with respect to the balance owing to him.

Recommendations:

1. The Act should allow for the registration of a general lien against all parcels of land improved for an owner where the owner enters into one contract for the improvement of all of the parcels and the lien claimant provides work, services or materials pursuant to a single contract or subcontract.
2. Where a lienholder has a general lien against several parcels, there should be power in the court to apportion the lien among the parcels for the purpose of determining

the lienholder's share as against other lienholders with specific liens of the same class.

5. Whether any change is required with respect to liens on condominium property?

Saskatchewan is the only jurisdiction which has developed special rules for liens on condominium property contained within its mechanics' lien legislation. Subsection 13(2) of the Saskatchewan Act provides as follows:

> 13(2) Subject to sections 29 and 37 but otherwise notwithstanding anything in this Act:
>
> (a) where, on the request of the owner of a unit:
>
> (i) work is done upon or in respect of that unit; or
>
> (ii) material is furnished to be used in that unit;
>
> any lien that arises under this Act in consequence thereof is upon the estate of the owner in that unit and his share in the common property; and any statement of lien filed in respect thereof shall be registered against the title to that unit;
>
> (b) where, on the request of a corporation:
>
> (i) work is done upon or in respect of the common property or any unit, or both; or
>
> (ii) material is furnished to be used in the common property or any unit, or both;
>
> intended for the benefit of the common property generally, any lien that

> arises under this Act in consequence thereof is upon the estates of all the owners in all the units and the common property;
> (c) where, on the request of a corporation:
>
> (i) work is done upon or in respect of any unit; or
> (ii) material is furnished to be used in any unit;
>
> intended for the benefit of that unit, any lien that arises under this Act in consequence thereof is upon the estate of the owner in that unit and his share in the common property;
> (d) where a statement of lien is filed with respect to any lien referred to in clause (b) or (c), the statement of lien shall be registered against the condominium plan and not against the title to any unit.

Similar provisions are established by the Alberta Condominium Property Act, R.S.A. 1980, c. C-22, s.70 except no legislative provision is made with respect to registration of the lien against the condominium plan as is provided by clause 13(2)(d) of the Saskatchewan Act.

One comment which may be made about the section as a whole is that it is peculiar how the section creates a lien for work and material only. One wonders what the position would be if the basis of a lien claimant's debt is services. Clause 13(2)(a) is self-evident and probably inserted to maintain the symmetry of the section. Clause 13(2)(b) is very useful to a lienholder who does work in relation to the common property.

But for this clause, a lienholder would have to lien all titles to all units to charge the common property. Clause 13(2)(c) is peculiar. Although it states only the interest of the unit holder when work is requested by the unit holder is bound, clause 13(2)(d) provides that the lien shall be filed against the condominium plan. Since subsection 6(1) of The Condominium Property Act provides that an owner holds his unit and his share in the common property subject to any interests affecting the unit or the condominium plan, clause 13(2)(d) has the effect of charging all units with the lien filed against the plan and not just the single unit. Thus, although clause 13(2)(c) purports to limit the lienholder's interest to the unit, by allowing the lien to be filed against the plan, all unit holders are affected.

The Committee considered whether it might be appropriate to clarify this issue by providing specifically, as in clause 13(2)(b), that where work, services or materials are provided in relation to a unit at the request of the corporation that the estates of all unit holders are charged. A corporation is likely to be requesting work, services or materials in relation to a unit when the corporation is doing regular maintenance as required under the bylaws or where the owner has failed to do maintenance as required under the bylaws. In the first case, there may be some justification for charging all of the units, but in the second, there would not seem to be any good reason to do so. In both cases, it is the single unit which is benefitted in any substantial way, and in both cases there is a serious impediment to the transfer and mortgage of all units. The Committee considered whether the latter problem could be overcome by allowing a unit holder to pay into court his proportionate equal share of the lien, in order to be able to transfer or mortgage his unit, but considering the potentially drawn out litigation in any case where the corporation decides not to settle the claim, felt on balance, that the better approach would be to provide that where work is done to a unit, only that unit is to be charged by the lien. The Committee noted that this decision will require a lienholder to determine whether he has provided services or materials to a unit or to the common property to enable him to decide whether he should register his lien against the title or the plan.

The Committee also considered whether special rules should be developed regarding the position of a purchaser _vis à vis_ claimants with unregistered liens against the land in cases where a purchase is made from a developer. Sections 75 and 76 of the British Columbia _Condominium Act_, R.S.B.C. 1979, c.61 provide that any lien must be filed within thirty-one days after the date the condominium unit is conveyed to the purchaser from the developer. The purchaser is required to retain from the developer a 15% holdback, or any smaller amount fixed by regulation, for forty days after the date of the conveyance. The holdback is charged with all outstanding liens and the purchaser may obtain their discharge by payment into court of the total of all filed claims or the full amount of the holdback. The Committee did not feel that special rules should be legislated with respect to the position of purchasers of condominium units as distinct from other purchasers. The Committee felt the rules that it has recommended for the vacating of liens should be applicable in all cases and that no special rules were warranted for purchasers of condominium units.

The Committee noted subsection 7(10) of the Ontario Condominium Property Act R.S.O. 1980, c.84 which provides that upon payment of a portion of an encumbrance, which is defined to include a lien, the claimant shall give the owner a discharge of the unit and its common interest. A similar section is contained in Manitoba's Condominium Act R.S.M. c. C170, s.8(9). Again, the Committee felt that its recommendation regarding the apportionment of general liens would adequately address this issue.

Recommendation:

Section 13 should be redrafted to provide for a lien for services or materials in relation to a unit to be on the estate of the owner in that unit and for a lien on the common property where services or materials are provided with respect to common property.

6. Whether there should be a lien for interest?

The Canadian Bankers' Association asked the Committee to consider allowing a lienholder to include in his claim any lien for interest that he might have.

Under the present law, it is unclear whether it is possible to include interest. In Bird Construction Company v. Ownix Development Ltd. (1981), 125 D.L.R. (3d) 680 (Ont. C.A.) the court held that there is no right to lien for interest. However, a different approach was taken in the following cases: Fundy Ventilation Ltd. v. Ferrigan Mechanical Contractors (N.B.) Ltd. et al. (1983), 44 N.B.R. (2d) 429 (N.B.Q.B.); Gravelstone Supply Ltd. v. General Scrap and Car Shredder Ltd. et al. (1982), 20 Man. R. (2d) 408 (M.C.C.); and Markan Enterprises Ltd. v. Horsman (1982), 39 B.C.L.R. 319

(B.C.C.C.). Also, in the case of Waisman, Ross & Associates v. Crown Trust Company (1970), 72 W.W.R. 531 the Supreme Court of Canada included interest in a lien claim without any discussion of the issue.

This question is best examined in the light of the nature of the lien remedy itself. It is granted to persons who provide work, services or materials for so much of the "price of the work, services or material as remains owing". One can argue that a part of the price can be interest for delayed payment. However, the lien remedy allows a claimant to attach contract moneys owing to the person above him in the construction pyramid. It is an extraordinary remedy and the issue is whether it should be extended to interest. Although it can be said that interest, in one sense, is part of the value of the work, services or material, it is not intrinsically part of the value. These commodities can be valued apart from the interest requirement to be paid.

Ontario has included the following subsection:

> 14(2) No person is entitled to a lien for interest for any interest on the amount owed to him in respect to the services or materials that have been supplied by him, but nothing in the subsection affects any right that he may otherwise have to recover that interest.

The explanation for this provision is cited at page 48 of the Committee Draft:

> The Committee is of the view that there should be no lien right for interest because interest does not represent an improvement to the value of the premises. Interest is recoverable in a personal judgment against the person who fails to pay his debts on time.

On balance, the Saskatchewan Committee agreed with this approach.

Recommendation:

There should be no ability to lien for interest.

7. Review of the lien against the Crown's interest.

Section 62 of the Saskatchewan Act contains special provisions dealing with the lien on Crown land. Subsection 62(1) provides:

> 62(1) Notwithstanding section 12 or 17, where an improvement mentioned in subsection 12(1) is a public work, the lien created by that section does not attach to the land occupied by the improvement or enjoyed therewith, but constitutes a lien and charge

> on the amounts directed to be retained by section 19.

"Public work" is defined to mean "any undertaking or improvement that is carried out by or on behalf of the Crown or that is owned by the Crown". The definition of "Crown" includes not only the Crown and her agents but local authorities under a variety of acts including the urban and rural municipalities Acts. This latter definition is taken from The Public Works Creditors' Payment Act which was repealed in 1979 when the Crown was brought under The Mechanics' Lien Act.

The Committee accepted the philosophy which is the basis of subsection 62(1) that, where the Crown is an owner within the meaning of the Act, the land of the Crown should not be subject to liens. It can be expected if the Crown has failed to maintain the holdback that it will have sufficient funds to remedy any deficiency. Furthermore, it would be against public policy and public convenience to allow the lien claimant to enforce his ultimate remedy of sale.

The Committee queried the necessity of the additional concept of "public work". Subsection 62(1) coupled with that definition can give the impression that there are situations when a lien could be registered against the certificate of title of the Crown; i.e., where the land is owned by the Crown but the work is not authorized by and the improvement is not owned by the Crown perhaps in the circumstances where the Crown is a landlord. The intent is clearly that under no circumstances can the Crown's interest be charged but where the Crown is an owner, then the lien is on the holdback required to be retained by the Act. Where the Crown is a landlord and has consented to the improvement so as to render the fee simple liable, specific provisions have to be incorporated into the enforcement sections to allow notice to be given in the same manner as when the holdback is sought to be attached where the Crown is an owner.

The list of Crown agencies should be expanded to include a local authority under The Northern Municipalities Act. From an examination of the present list it would appear that The Municipal Public Works Act does not create a local authority but merely empowers local authorities to do certain things, and should probably be deleted.

In addition to the above provisions dealing with the Crown, section 2.1, added in 1979, provides that the Act does not apply to contracts entered into pursuant to The Highways and Transportation Act or streets or highways owned by the Crown. This would clearly eliminate the application of the lien and holdback provisions and, one would also think, the trust provisions. With respect to the latter, the case of Canadian Bank of Commerce v. T. McAvity & Sons Ltd., [1959] S.C.R. 478 held that although the Act expressly provided that it did not apply to public streets or highways, the trust provisions did apply.

The Committee received no briefs as to whether the requirement to maintain a holdback and the creation of the lien on holdback provisions should apply to highway projects. Without any submissions on this point, the Committee was reluctant to extend the operation of the Act and accordingly, it was resolved to make no changes to the Act in this regard.

With respect to the application of the trust provisions, the Committee felt that the decision in the T. McAvity case would apply. In examining the trust provisions proposed by the Committee it was felt that this would work no great hardship on the Crown or contractors to the Crown and insofar as the trust provisions ensure that funds remain in the construction pyramid, is of some benefit.

Recommendations:

1. The provisions dealing with Crown liens should be drafted

to specifically state that a lien cannot attach Crown lands and that only the holdback is charged with the lien when the Crown is an owner within the meaning of the Act.

2. The Municipal Public Works Act should be deleted from the definition of Crown and The Northern Municipalities Act should be added.
3. Contracts under The Highways and Transportation Act and streets or highways owned by the Crown should continue to be eliminated from the Act but no special provisions should be added with respect to the application of the trust provisions.

8. Whether municipalities should be liable to the extent of any deficiency in the amount of the holdback with respect to services provided to subdivisions?

The Saskatchewan Construction Association requested that the Committee consider making municipalities liable for any deficiency in the holdback where land is dedicated to the Crown as a street or lane as a result of the registration of a plan of subdivision and the municipality requires improvements made in relation to the streets to be absorbed by the developer as a condition of receiving subdivision approval. The Association pointed out that if this work were contracted for by the municipality, the municipality would be required to maintain a holdback, but in the circumstances outlined although the municipality receives the benefits of the improvement, it is not required to make up any deficiency if the developer fails to maintain the required holdback. An Ontario case illustrating the problem is George Wimpey Canada Ltd. v. Peelton Hills Ltd. (1981), 119 D.L.R. (3d) 408 (Div. Ct.) affirmed 35 O.R. (2d) 787 (Ont. C.A.) and see also Anthes Imperial Ltd. v. Earl Grey (Village) (1970), 75 W.W.R. 566 (Sask.C.A.).

To resolve this problem, Ontario has included the following section:

> 17(4) Despite subsection (1), where land is dedicated to a municipality as a public street or highway and an improvement is made to the land at the written request of, or under an agreement with, the municipality, but not at its expense, the municipality shall nevertheless, on default of payment by the proper payer, be liable to the value of the holdbacks under Part IV that would have been required were the improvement made at the expense of the municipality, and the procedure for making a claim under this subsection shall be the same as for enforcing a claim for lien against a municipality in respect of a public street or highway.

A similar section is found in the Manitoba Act, see subsection 22(2).

The Committee felt that a section like the one appearing in Ontario and Manitoba is consistent with decisions it has made with respect to charging joint owners' and landlords' interests, but it also felt that although this may be a problem in Ontario, it has not manifested itself in Saskatchewan. With the enactment of a section of this type, in order for a municipality to protect itself, it would require the contractor to deposit the holdback in an account over which the municipality has control, provide a letter of credit or require only bonded contractors and subcontractors to work on such projects. The Committee agreed that this additional cost would only be justified if it were satisfied that this is a problem for construction in Saskatchewan. Furthermore, unlike many jurisdictions in Canada, municipalities in Saskatchewan only have administrative control over streets and lanes. Streets and lanes are vested in Her Majesty the Queen. Finally, it is noted that unlike other Crown property, streets and lanes are excluded from the Act (see section 2.1) as are highways presumably on the basis that there does not exist any problem with respect to this type of construction. The lack of many briefs to the Committee, or Saskatchewan case law on point bears this out.

Recommendation:

No special provision should be made rendering municipalities liable for holdback deficiencies for improvements on dedicated streets and lanes.

9. Should there be a minimum dollar value for a lien?

Subsection 30(5) of the present Act provides that no claim of lien shall be registered or enforced under the Act where the amount or the total of all amounts claimed by a number of claimants claiming in one lien does not exceed $50. This amount was set in 1920 by An Act to Amend The Mechanics' Lien Act, S.S. 1920, c.72, s.1.

Manitoba provides, in section 14, that no lien exists under The Builders' Liens Act for a claim of less than $300. There are a variety of amounts existing in the other provinces: British Columbia - $20; Alberta - $20; New Brunswick - $100; Prince Edward Island - $32. Manitoba is the only jurisdiction in recent times who has amended its legislation on this point. It would appear that Ontario does not establish a minimum dollar value for liens.

The Committee considered the possibility of a two pronged approach which would provide no lien less than a specified amount may be registered or be the basis of proceedings but such a lien may shelter behind a lien which has met the minimum amount. The Committee rejected this for the reason that even this limited protection is not without its cost to the industry and concluded that for small amounts lien claimants could use the regular process of enforcing unsecured amounts through the courts. On this basis, the Committee was attracted to some proposals that would see the minimum amounts set as high as $500. In its "Tentative Proposals", the Committee felt that an increase of this magnitude could not be justified and adopted a level of $300.

The Committee received a number of responses to its recommendation on this point. Some wished no minimum lien amount, others wished it to remain at $50 and still others felt that the minimum amount should be set at $1,000. The Committee re-affirmed its decision that there should be a minimum amount. Collection of small amounts is expensive for the industry and should be discouraged. As to what the minimum amount should be, the Committee was divided but felt that $100 would more closely approximate the value of some of the smaller services and materials provided and would assist labourers in pursuing wage claims.

The Committee also preferred a wording which would clearly provide that no lien exists for amounts less than $100.

Recommendation:

No lien should exist for amounts less than $100.

10. Whether it should be possible to set off against a lien?

Section 18 sets out a concept which is crucial to the operation and understanding of the Act:

> 18(1) Except as otherwise provided in this Act, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.
>
> (2) Except as otherwise provided in this Act, where the lien is claimed by a person other than the contractor the amount that may be claimed in respect thereof is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been performed, the services rendered or the materials furnished.

The opening words "except as otherwise provided in this Act" refer to the requirement to maintain a holdback: Western Tractor and Equipment Company v. Milestone School Unit No. 12 (1960), 33 W.W.R. 249 (Sask. C.A.).

But for these provisions there would be no limit on an owner's liability. In addition to these provisions, Ontario provides that in calculating the maximum amount of a person's lien, "there may be taken into account the amount, that is, as between a payer and the person he is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages, whether or not related to the improvement:" see section 17. In Construction Lien Remedies In Ontario by Kevin McGuinness, the author makes the following comment regarding subsection 17(2) at pages 128 and 129:

> In drafting these provisions, the Committee clearly seems to have been primarily concerned with a perceived need to protect payers. The policy implicit in the section seems to be that a payer should not be required to pay an amount that he would subsequently be entitled to recover in an action against the recipient. Although no real justification is advanced in support of the Committee's decision to depart from the previous rules of set-off, it is likely that the practical consequences of this decision will be slight. Even under the old Act, payers were only rarely willing to pay a debt when they were aware that they had an unliquidated claim in damages against the recipient. The normal practice was to withhold (or partially withhold) payment, and allow the recipient to bring action if he believed that an unreasonable set-off had been taken by the payer. Thus, even though section 17(3) appears to be a marked departure from earlier law, it is in fact no more than a statutory recognition of established practice.

The Committee felt that there should be a right of set off with respect to funds over and above the holdback as long as the subject matter of the set off relates to the contract. Persons who provide services and materials have the right to expect that the contract funds will not be siphoned off to the payment of debts unrelated to the improvement. Furthermore, this decision is dictated by the previous decision of the Committee to allow set off as between a trustee and his beneficiary, subject of course to the requirement to maintain the holdback, contained in Part I of this Report.

Recommendation:

The legislation should provide for a right to set off as against the lien for all debts, claims or damages incurred with respect to the improvement up to but not including the holdback.

11. Should the lien on materials be retained in the form of subsection 14(4) of the present Act?

It is necessary to examine closely the definition of "lien", subsections 14(3) and (4) and 51(4) for the resolution of this problem:

> 2(1)(f) "lien" means a lien created by this Act;
>
> 14(3) During the continuance of a lien no part of the material giving rise to the lien shall be removed to the prejudice of the lien and any attempt at such removal may be restrained by a judge on summary application made to him.
>
> 14(4) Material actually delivered within the meaning of subsection (1) to be used on or in respect of an improvement:
>
> (a) is subject to a lien or charge in favour of the person furnishing the material until the material is incorporated in the improvement; and
>
> (b) is not subject to execution or other process to enforce payment of a debt other than a debt for the purchase price of the material due to the person furnishing the same.
>
> 51(4) The judge may also direct the sale of any materials and authorize the removal of them.

Section 14 first appeared in Saskatchewan legislation in the 1973 revision. It formed part of the draft Act appended to the Thomson Report but was not the subject matter of comment in the body of the report nor does it seem to have formed part of any of the submissions received by the Royal Commission.

Subsection 14(4) appears to have been taken from Alberta legislation which can trace its origins to the 1873 Acts of Ontario and Manitoba. British Columbia and Newfoundland do not have a comparable provision. Ontario, as a result of the 1966 Ontario Law Reform Commission Report, did not re-enact its provision on point when it passed new legislation in 1969. The Ontario Law Reform Commission made this comment regarding Ontario's section:

> This section provides for a lien for the unpaid purchase price of materials actually delivered for the purpose of being incorporated into a building or works, but which have not been actually so incorporated. Under this section the lien is on the material not on the real property. Many questions arise in this application. One asks: how is the lien to be realized and does one enforce a lien on sand and gravel delivered to a project site when some has been supplied by one supplier and some by another and some portion of that supplied is incorporated into the building and some is not? We do not think the lien claimant under subsection (1) should be in any different position from the lien claimant who has delivered material to the property and the material has been actually incorporated into the building or works.

As a result of the Commission's recommendation, Ontario's new 1969 Act did not include this section. All other jurisdictions in Canada have a comparable provision.

The predecessors of subsection 14(4), in other provinces, appear to have been enacted to provide for a deficiency which existed in the main lien section which only created a lien on land and did not encompass a lien for materials not incorporated into the structure, (note section 12 of the existing Saskatchewan Act in this regard). It is instructive to note that those jurisdictions, which do not have a separate section for liens on materials, allow a lien on materials for all persons who provide materials, work or services to an improvement.

Section 4 of the British Columbia Act reads as follows:

> 4 Subject to this Act, a worker, material man, contractor or subcontractor who does or causes to be done any work upon, or supplies material, or does both work and supplies material, to or for an improvement, for an owner, contractor or subcontractor, has a lien for wages or for the price of the work or material, or both or any of them, or for so much of it as remains owing to him, upon the interest of the owner in the improvement, on the improvement itself, on the material delivered to or placed on the land on which the improvement is situated and on the land.

The definition of "premises" and subsection 14(1) of the Ontario Act are:

> 1.19. "premises" includes,
>
> i. the improvement,
>
> ii. all materials supplied to the improvement, and
>
> iii. the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

> 14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

There is no universal agreement as to the meaning of the Canadian counterparts of subsection 14(4) of the Saskatchewan Act. In 1960, the Ontario Court of Appeal had occasion to consider such a provision in the case of Re Northlands Grading Co. Ltd., [1960] O.R. 455. Schroeder, J.A. made this comment at page 460:

> It is to be noted that s. 15 makes no reference to the Sale of Goods Act and I would observe in passing that one would normally expect to find, in an enactment such as s. 15, some reference thereto as e.g. notwithstanding anything contained in the Sale of Goods Act, if it were intended to amend the provisions of that statute by extending the vendor's right of lien as contended here.
>
> I cannot be persuaded to give effect to a submission containing elements of novelty so far-reaching in their implications as to do violence to all universally accepted ideas as to the scope and purpose of the Mechanics' Lien Act. Moreover, the startling proposition advanced by counsel for the appellant, is, in my view, completely out of harmony with the spirit of that Act which is concerned with making provision for a fair and equitable distribution among persons who performed work or supplied materials for use in connection with some building, erection, structure or works upon lands, provided that they employ the means and adopt the rules

> fixed by the law to enable them to obtain these rights.

However, the Alberta Court of Appeal took a different approach in the case of John Wood Company Limited v. Canadian Credit Men's Trust Association Limited (1962), 39 W.W.R. 593. The Court held that the lien for materials exists independently of the enforcement provisions of the Act. It is separate and distinct from a lien created on the land and does not require registration in a land titles office. Western Caissons (Alta.) Ltd. v. Bower et al (1970), 71 W.W.R. 604 (Alta. C.A.) tempered the earlier Court of Appeal decision somewhat by holding that the disposition of a claim under the lien on materials section must be dealt with at the time when the Court deals with all claims made and not as a separate matter by way of seizure under distress warrant and sale.

Yet another Court of Appeal has spoken on this issue in the case of Marble Center Limited v. Kenney Construction Co. Ltd. et al. (1972), 29 D.L.R. (3d) 64 (N.S.C.C.) affirmed (1973) 38 D.L.R. (3d) 319 (N.S.C.A.). In the county court decision, Judge O Hearn attempted to reconcile the Ontario and Alberta Court of Appeal decisions by holding that the lien on materials is merely an extension of the lien created by section 5 so as to apply the general lien to materials brought on the land to be used in connection with the land for any of the purposes enumerated and that materials so brought on may not be removed if to do so would prejudice the general lien for all claimants.

In Mechanics' Liens in Canada, 4th edition, the authors in approving the Northland case, made the following comment at page 94:

> It would seem that to hold otherwise would give the supplier of material an unfair advantage over other lien claimants and bring about something different than the fair and equitable distribution among persons who perform work or supply materials for use in connection with the erection of a building which is contemplated by all other provisions of the Act.

Subsection 14(4) is particularly troublesome for what it does not say or for what it says obliquely. If the John Wood case is correct the following are the logical consequences:

(a) a materialman whose materials are not incorporated has a lien on both the land and the materials - other lien claimants including other materialmen only have a lien on the land;

(b) there are different priorities among lien claimants including among materialmen, which is directly contrary to the direction for pari passu distribution in section 26 of the existing Act;

(c) if the materialman is paid, no other lien claimant is entitled to a lien on the material;

(d) in the event of default or abandonment, materialmen are invited to resort to self-help remedies even though they are unable to identify their property [this latter point may be brought into question by the Western Caissons case which appears to require materialmen to prove their claims in the main action but this point is not clear].

In addition we do not know what the priority outcome would be in a contest between the secured creditors financing the material and the materialman. Both could have purchase-money security interests but in most cases the materialman will have been led to believe that he need not register his interest by virtue of subsection 14(4). In all probability, a court would conclude that the lien or charge created by this subsection is defeated by any security interest in the materials. There is nothing in The Mechanics' Lien Act which would dictate the contrary. If the John Wood case is not the law, the alternatives proposed by the Ontario and Alberta Court of Appeal do not advance us towards a more easily understood Mechanics' Lien Act.

The two benefits which may be conferred by subsection 14(4) are the priority over other lien claimants and the right to remove the materials upon default or abandonment. These are not conclusive nor is it clear these benefits reflect correct policy choices. A materialman who wishes to gain these benefits should take security in the normal way and not rely on the provisions of The Mechanics' Lien Act (see U.S. Construction Co. v. Rat Portage Lumber Co. (1915), 25 D.L.R. 162 (Man. C.A.) and Hill v. Storey (1915) 25 D.L.R. 247 (Ont. C.A.)). The Committee felt that a preferable approach would be to create a lien on the materials in favour of all lien claimants. This is more in keeping with the philosophy of the Act: to provide fair and equitable distribution among all persons who provide services and materials to an improvement.

Recommendation:

All persons who provide services or materials should have a lien on land and any materials furnished within the meaning of the Act.

12. Whether there should be special rules for liens arising as a result of the recovery of minerals?

Subsection 12(2) of the Saskatchewan Act provides that where work is done in connection with the recovery of a mineral, the lien attaches to all the estates or interests in the mineral other than the estate in fee simple unless that owner has expressly requested the work. Subsection 12(3) extends the lien to the mineral when severed and in the hands of the owner and any proceeds therefrom including any amounts paid to the owner in lieu of the mineral. Subsection 12(4) further extends the lien to any fixture or equipment in or on the mine, oil well, etc.

Subsections (3) and (4) are peculiar in the context of The Mechanics' Lien Act in that they extend the application of the Act beyond improvements to land to personal property; i.e., minerals severed from the land and equipment belonging to the owner.

Subsection 12(4) was added in 1939 by An Act to amend The Mechanics' Lien Act and has remained in substantially the same form. No other jurisdiction in Canada has a comparable section.

Subsections 12(2) and (3) were inserted in 1973 as a result of a recommendation contained in the Thomson Report. His Honour made this comment at page 33:

> Conditions in the petroleum industry in this province are much the same as they are in Alberta and complications of the same kind are bound to arise here sooner or later. Counsel for the Canadian Petroleum Association urged that our Mechanics' Lien Act should contain the same provisions in regard to this matter as the Alberta Statute. There should be as much uniformity as possible between the Acts of Saskatchewan and Alberta and I have accordingly incorporated the Alberta subsections into the revision.

The Alberta subsection 4(2) is exactly the same as Saskatchewan's 12(2) but Alberta's subsection 4(3) is somewhat different and reads as follows:

> 4(3) A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when severed from the land.

Saskatchewan's subsection 12(2) was recently the subject of interpretation by our Court of Appeal. The resulting decision shows the ambiguity of these subsections. His Lordship Hall, J.A. in Canada Trust Company v. Cenex Limited, [1982] 2 W.W.R. 361 held that subsection 12(2) charged not only all the estates or interests of the minerals in the ground but when they are severed the lien also attaches the mines and minerals. His Lordship interpreted "estate or interest" to include the interest of a debenture financer and a bank holding a section 88 Bank Act interest and granted priority to the lien claimants over the secured parties even though the interests of the secured parties were prior in time. The Court went on to reconcile subsection 12(2) with 12(3) by extending the lien to the mines and minerals, when severed in the hands of the owner of the fee simple estate. Leave to appeal to the Supreme Court of Canada has been denied.

Turning subsection 12(2) into a section establishing a priority rule creates serious consequences for financers of mining and oil and gas interests. In the Cenex case the Crown was the owner of the fee simple interest. Therefore, notice was registered by the mechanics' lien claimants with the Records Officer, Department of Energy and Mines under section 35 of the Act. If the Crown was not the owner of the fee simple estate it would seem peculiar to register the personal property interest in the land titles office and it would probably have to be done by caveat if at all. It is possible, based on the case of Earl F. Wakefield Company v. Oil City Petroleum (Leduc) Ltd. et al., [1958] S.C.R. 361 affirmed (1959) 29 W.W.R. 638 (P.C.), that registration is not even required in order to charge the personal property interest. There is no provision in The Personal Property Security Act for the registration of this type of interest.

The priority rule selected by the Court of Appeal is also unfortunate in that it places prior financers at risk and, it would appear, their liability extends beyond the owner's liability for deficiencies in the holdback to the full lien claim to the extent of the value of the mineral claim. In other parts of the Act only real property security interests or advances subsequent in time to a mechanics' lien interest take subject to the lien and, it can be argued, that these do so subject to deficiencies in the holdback and not for the full amount of the lien.

The Committee felt that there was a justification for extending the lien on land and materials to severed minerals and to the equipment of the owner. When there is default in the oil and gas industry, there is little for the lien claimants to attach in the way of an improvement and resort must be had to the personal property of the owner. However, this lien should only be an extension and not a different lien from the lien currently created by subsection 12(1) as found by the Cenex case. The priority rules for all liens would then continue to apply. The only priority a lien claimant would have in relation to severed minerals or equipment would be priority over unsecured creditors. To attempt to give priority over secured creditors would seem to be an expensive intrusion into the priority structure relating to personal property. It would be unfair to confer priority without requiring registration of the lien in the Personal Property Registry and providing for the giving of and the effect of notice to secured parties. Registration is not required to take priority over unsecured creditors as the law has long since assumed that unsecured creditors do not rely on the registry: see section 180 of The Land Titles Act and The Personal Property Security Act, seriatim.

Recommendations:

1. The lien on the land and materials should also extend to severed minerals, etc., and equipment, etc., owned by the owner recovering the minerals.

2. The general priority rules will apply to the lien as extended.

3. Registration of the lien in the land titles office in relation to the land will be sufficient to obtain the priority shared by all lien claimants, in relation to the land, over unsecured creditors claiming in relation to severed minerals, etc., and equipment, etc.

13. Whether liens for the improvement of chattels should continue to be governed by the Act?

Section 61 of the Act provides that a person who improves chattels has a lien for the value of the improvement and also provides a method to enforce this lien. The Committee felt the continued presence of section 61 in The Mechanics' Lien Act was incongruous. It should either stand on its own in a separate Act or be added to another statute like The Garage Keepers Act which Act would, of course, have to be made more broad, in its scope, to cover all repairers' liens. In either case the position of repairers should be reviewed to ensure that sufficient priority rules are developed to rationalize the position of repairers as against third parties with interests in chattels. It was unclear to the Committee whether priority rules like section 25 were intended to cover liens created by section 61. These latter points were not seen as part of the mandate of the Committee and should be referred back to the Department of Justice for review.

Recommendations:

1. Liens for the improvement of chattels should not form part of a statute dealing with liens for improvement to land.

2. The general question of repairers' liens should be referred back to the Department of Justice for further review in the context of repairers' liens generally.

PART III

THE HOLDBACK

1. What should be the rate of the holdback?

As has been discussed, the holdback serves to limit the liability of the owner, and anyone claiming through him, and provides a fund for lien claimants in the event of non-payment, default or abandonment by some person above the lien claimant in the construction pyramid. However, determining the rate is not simply a matter of balancing the interests of the owner against those of the lien claimant. In many cases the interests of those who may become lien claimants are aligned with the interest of the owner. On a healthy construction project the more money that flows down the pyramid the better the position of all parties. Since there need be no holdback retained from materialmen not acting pursuant to a subcontract or from labourers and since many materialmen insist on payment before delivery, contractors and subcontractors are required to finance the holdback. The smaller the holdback, the less money the contractor or subcontractor is required to obtain from another source. On the other hand, in the event of default the holdback is never large enough to meet the claims of all persons. And, for labourers and materialmen not acting pursuant to a subcontract, from whom no holdback is retained, the holdback is also never enough as these people are not directly affected by the rate.

In recent years and sparked to some extent, by the Ontario Discussion Draft, the economic factor of impeding the flow of funds down the construction chain has been emphasized. The Discussion Draft describes the issue in this way at page 10:

> Traditionally, the holdback rate has been set at the prevailing margin of profit within the construction industry. Where the holdback relates to the profit, the contractor and subcontractor receive enough payment to satisfy their obligations to those who supply services or materials under agreement with them. The current rate of profit in the construction industry is no longer near 15%. It now runs closer to 5%. Thus, a contractor or subcontractor from whom a holdback has been retained must often borrow money in order to pay for the services or materials which have been supplied to him. This borrowing increases the possibility of insolvency by a contractor or subcontractor. Insolvency of a contractor or major subcontractor imperils the completion of a project and the real security of everyone involved. Thus, the holdback though designed to provide security to the suppliers of services and materials, can endanger that security if it is set too high.

The following statute citations indicate the position in the other common law provinces of Canada:

(a) Builders' Lien Act, R.S.A. 1980, c. B-12, ss. 15, 16, 18 - 15% plus any amount payable under the contract which has not been paid by the owner in good faith;

(b) Builders Lien Act, R.S.B.C. 1979, c. 40, s. 20 - 15% [a bill is now before the B.C. Legislature to reduce this to 10%];

(c) The Builders' Liens Act, S.M. 1981, c. B91, s.24 - 7.5%;

(d) The Construction Lien Act, 1983, S.O. 1983, c. 6, s. 22 - 10%;

(e) Mechanics' Lien Act, R.S.N.S. 1967, c. 178, s. 12 - prior to June 24, 1981, the rate was split. Up to and including $15,000 the rate was 20%. For amounts in excess of $15,000 the rate was 15%. On June 24, 1981, section 12 was amended and rate was set at 10%;

(f) Mechanics' Lien Act, R.S.P.E.I. 1974, c. M-7, ss. 15, 17 - same as Nova Scotia as it existed prior to June 1981;

(g) The Mechanics' Lien Act, R.S.Nfld. 1970, c. 229, s. 13 - 10%;

(h) The Mechanics' Lien Act, R.S.N.B. c. 142, ss. 15, 17 - same as Nova Scotia as it existed prior to June 1981.

At present, the rate in Saskatchewan is set by subsections 19(1) and (4) of the Act which read as follows:

> 19(1) Subject to subsection (4), in all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under this Act shall as the work is done, services are rendered or materials are furnished under the contract retain for the statutory period twenty per cent of the value of the work done, services rendered or materials furnished irrespective of whether the contract provides for periodic payments or payment on completion of the work, services or furnishing of the materials or otherwise, as the case may be.

> (4) Where the contract price or, if there is no specific price, the actual value of the work, services and materials exceeds $25,000, the amount to be retained shall be equal to fifteen per cent instead of twenty per cent of the value of the work, services and materials calculated according to subsection (3); but in no case shall the amount retained be less than the amount that would be required to be retained pursuant to subsection (1) or (3) if the value of the work, services and materials was exactly $25,000.

If the rate is lowered, the amount of the fund upon which a contractor can claim is reduced. This makes it less worthwhile for a lien claimant to pursue his claim through legal methods. On the other hand, the liability of the owner is decreased. In the event of the need to claim on the fund, the owner who has failed to maintain the holdback may free his land from claims by proffering 10% of the contract price as opposed to 15% or 20% as the case may be under the present law.

From an economic standpoint, if one assumes that the delay in receiving funds increases the cost of construction contracts, a reduction in the holdback should see a concomitant reduction in construction costs to the owner.

What is the benefit to the contractor, subcontractor, materialman or labourer? For the contractor and subcontractor it is possible that the increased costs due to the inability to receive full progress payments are not recouped; i.e., although the contractor and subcontractor build into their bids a cost amount associated with the holdback, it may be that the amount so built in does not equal the amount of the cost of the holdback. If this is the case, then there may be some economic benefits linked to the fact that a contractor or subcontractor, who feels constrained to pay out 100% of a due progress release, may save the cost of borrowing the difference between a 10% holdback (as proposed in Ontario) and a 15% or 20% holdback as it exists in Saskatchewan at the present time. There may also be a benefit in decreased insolvencies as a result of getting more money down the chain at the time of substantial performance.

For the labourer and materialman, the only possible benefit is the latter one - the possibility of reduced insolvencies.

It has also been urged upon us by at least one brief that a reduction in the holdback would overall make Saskatchewan materialmen, who supply pursuant to a subcontract, more competitive with Manitoba and Ontario suppliers who have to compete in their markets on a 7.5% and 10% holdback basis, respectively.

The Committee felt that it would be difficult to resist the trend to a lower rate but that it would be important in proposing the reduction of the holdback to consider other ways to maintain the balance between the partners in the construction pyramid. These ways would include securing the holdback, providing for personal liability of the owner to lien claimants in the event of deficiency in the holdback, lengthening the lien period and simplifying the procedure for releasing the holdback.

The Committee also considered whether any distinction should be made between small and large contracts. It was felt that this distinction has led to confusion as to the percentage to be applied to the contract or subcontract price. The Committee could see no good reason for the differentiation and resolved to eliminate it.

Recommendations:

1. Subject to the acceptance of other recommendations dealing with securing the holdback, the rate for the holdback should be set at 10%.
2. There should be no difference in the rate depending on the value of the contract price.

2. Whether the method of calculating the holdback can be clarified?

The Committee received a number of comments indicating the difficulty in calculating the holdback where no work has commenced. Subsection 19(1) of the Saskatchewan Act provides that the holdback shall be calculated on the "value" of the work, services or materials. Subsection 19(3) directs that "value" shall be calculated "on the basis of the contract price or, if there is no specific price, on the basis of the actual value of the work, services and materials."

Manitoba attempted to clarify this issue by requiring the person primarily liable on the contract to "deduct 7.5% of each payment to be made by him...so that the total holdback shall be equal to 7.5% of the contract price for the whole contract, or if there is no specific contract price, 7.5% of the total value of the work, services and materials" (see Manitoba s. 24(1)). This is not without its own problems if no money is advanced until after the entire project is complete, if the value of the work exceeds the amount of money advanced or certified to be paid or if no payment is to be made in money. Subsection 19(1) of the Saskatchewan Act makes it clear that the holdback is to be calculated "irrespective of whether the contract provides for periodic payments or payment on completion of the work, services or furnishing of the materials or otherwise, as the case may be". It has always been the intention of the Act that the liability to retain a holdback is not dependent upon the payment being due under the contract. The obligation to retain the holdback exists as soon as the services or materials are first provided with the amount retained increasing as the value of the services or materials increases. The Committee felt that there was an interpretation that could be placed on the present subsection 19(3) which would interpret "calculated on the basis of the contract price" to include funds expended even though no services or materials were provided. To make the matter beyond doubt, the Committee resolved to include a subsection specifying that where a payment on account is made, the person liable to retain the holdback shall calculate the holdback based on the amount of the payment as long as the amount of the payment on account is not less than the value of the services or materials provided at the time the obligation to make the payment arises.

Recommendation:

It should be possible for a payer to calculate the holdback based on the amount of the payment as long as the amount of the payment on account is not less than the value of the services or materials provided at the time the obligation to make the payment arises.

3. Whether payments above the holdback should be tied to the good faith of the payer?

Subsection 20(7) of the Saskatchewan Act provides that payments above the holdback and release of the holdback made pursuant to section 20 will discharge pro tanto the lien if "made in good faith...before notice in writing of the lien is given by the person claiming the lien".

Macklem and Bristow, 4th ed. at page 142 make this comment regarding "good faith":

> The requirement of good faith is included to protect the lienholder where the owner sets up a contractor who is little more than a man of straw with the intention of securing improvements to his land without paying for them. Whether or not the owner has made payments in good faith is a question of fact to be determined from all the circumstances and the onus in most cases rests upon the person alleging mala fides: Len Arris & Co. v. Peloso, [1958] O.R. 643 at 650 (C.A.).

There are a number of cases which have held that mere knowledge by the owner of financial difficulty or unpaid suppliers does not in itself establish that if payment is made the owner did not make them in good faith. The leading case on point in Saskatchewan is Western Tractor & Equipment Co. Ltd. v. Milestone School Unit No. 12 (1960), 33 W.W.R. 249 (Sask.

C.A.). Nonetheless a number of persons advised the Committee of the uncertainty that the concept of "good faith" imports to the construction industry and, that sometimes, it is used as a means to withhold payment unjustifiably.

Another problem raised with the Committee was whether the notice distributed to owners and first mortgagees pursuant to section 256 of The Land Titles Act affected the "good faith" of the payer or constituted "written notice by the person entitled to a lien".

The Committee thought that the release of funds should not be dependent on uncertain factors like "good faith". It should be possible to hold up payment only by giving written notice of lien containing certain specific information or registration or giving notice of a claim of lien to Crown agencies.

Recommendations:

1. Release of funds should not be dependent on the good faith of the owner.
2. Only receiving written notice of lien or the registration or the giving of the claim of lien should impede the flow of funds.

4. Whether the holdback should be secured?

The brief received by the Committee from the Saskatchewan Construction Association pointed to the "notional" nature of the holdback as being a source of problems with the present Mechanics' Lien Act. Although section 19 of the Act requires "the person primarily liable on a contract" to retain the holdback, in actual fact the owner defers the cost of borrowing until such time as he is required to pay the holdback. Since the holdback does not exist except in conceptual terms, in the event of insolvency on the part of the owner, or if the contract is abandoned, and the land is sold it is possible for the amount representing the holdback to be consumed by any mortgage prior in time to the mechanics' lien claims. The Saskatchewan Construction Association felt that one way of ensuring a fund for the mechanics' lien claimant would be to require the owner to actually deposit the holdback into an interest bearing trust account with the interest accruing to the persons entitled to payment of the holdback. On the other hand, HUDAC has indicated its opposition to such a change on the basis that the accounting details and costs will only increase the cost of doing business.

The idea for an interest-bearing trust account appears to have arisen in Canada with the Ontario Discussion Draft which recommended, where the value of the work to be done exceeds $150,000, other than on Crown or municipal contracts, that the owner be required to deposit the actual amount of the holdback into an interest bearing trust account, held jointly in the name of the owner and the general contractor, as trustees for the benefit of all persons entitled to liens.

This concept was carried into legislation by the Manitoba government. Subsection 24(3) of the Manitoba Act provides as follows:

> 24(3) Where the total price of work to be done, services to be provided and materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section, or, if there is no specific contract price, the actual value of the work to be done, the services to be provided and the materials to be supplied under a contract exceeds the amount prescribed in the regulations for the purpose of this section the owner shall, as the work is done, the services provided and the materials supplied under the contract, pay the holdback into a holdback account.

At the time of publishing this report, the value as set by regulation is $200,000.

The Ontario Committee reviewing the Discussion Draft concluded that the establishment of an interest-bearing trust account would not be practical for construction in Ontario.

The Committee appears to have been primarily concerned with the increased cost of administration which such a scheme would generate. However, the Ontario Committee felt that it was extremely important to secure the holdback and the mechanism ultimately chosen was to realign the priorities between mortgagees who loan money for construction and mechanics' lien claimants. It does this by giving the lien priority over any building mortgage even though the mortgage is granted prior to the commencement of work on the improvement. Subsection 80(2) of the Ontario Construction Lien Act provides as follows:

> 80(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

The Committee agreed with the brief submitted by the Saskatchewan Construction Association that the holdback must be secured. The holdback represents money already earned by those who have provided materials or services to an improvement and, in this regard, should be secured for the benefit of those persons who have earned it. However, the Committee was concerned that the requirement to pay the interest earned on the joint trust account to those persons entitled to the holdback could impose serious administrative difficulties. For example, the trustee would have to determine when work commenced and using this figure and the date work was completed on a particular subcontract, a value would have to be placed upon the interest earned on the holdback during that period. This would impose a serious administrative burden upon the owner and for what benefit? In the absence of an interest bearing trust account and even with an interest-bearing trust account lien claimants can, as a matter of contract, claim interest. The only possible benefit for arguing that the interest earned on the holdback should be paid to those persons to whom the holdback belongs is that, economically speaking, it might have the effect of reducing the cost of construction. The potential increase in administrative costs, it was felt, would vastly outweigh the possibility of a decrease in construction costs due to the possibility of receiving interest on the holdback. However, the Committee was very attracted to the concept of a joint trust account for a number of reasons. First, in some cases, on some projects, the holdback is presently placed in a trust account. Clearly, lien claimants, with knowledge of the existence of a joint trust account for the holdback, would be and feel more confident that the holdback will be paid to them. Furthermore, requiring the owner to place the holdback into a joint trust account would be a means of determining the amount of the holdback and determining the work done to date and, to some extent, determining the amount of the claims if default occurs before completion of the project. All of this would be in addition to the primary purpose for the creation of the joint trust account and that is to secure the holdback in the event of default or abandonment of the contract.

The Committee seriously considered the possibility of securing the holdback by giving a stronger priority over prior mortgages but were concerned that this route would appear to adversely affect the possibility of obtaining credit on construction projects. It would require a greater intervention by the financial community into the paying out of the holdback and could possibly slow down its release. The mortgage priority would be a solution that would require the parties to litigate. In the event of default before completion, the issues as to the amount of the holdback, determining the work done to date and determining the amount of the claims would have to be resolved through the litigation process. There would be no records as there would be with the holdback trust account concept to assist the parties in determining crucial dates and amounts.

Accordingly, on balance, the Committee resolved to secure the holdback by requiring the owner, with the general contractor, or the major subcontractor in any case where it would be inappropriate for the general contractor to act with the owner or where there is no general contractor, to jointly administer a holdback trust account with no requirement to pay interest to the beneficiaries of the account.

The Committee then turned to a consideration as to whether or not certain types of contracts or contracts for a particular amount should be excluded from the requirement to administer a joint holdback trust account. Clearly, there would be no need to impose such an obligation upon the Crown, Crown agencies or municipal corporations. Owners in this context, it can be expected, will always have sufficient funds to pay the holdback.

With respect to whether or not certain projects according to a specific dollar value should be exempt from the requirement, the Committee was not unmindful of the comments of the Ontario Committee Draft which criticized the imposition of an interest-bearing joint trust account by virtue of the fact that it would not apply to small contracts. The Ontario Committee Draft felt that it was principally with respect to this type of contract that the industry could most benefit from some means of securing the holdback.

In its "Tentative Proposals" the Committee also considered whether or not the requirement should be imposed upon the construction of residential homes. The Committee was concerned that this was an area of the construction industry that could benefit from more stringent rules regarding the securing of the holdback. However, following release of its first Report the Committee received strong opposition from HUDAC to the application of the joint holdback trust account to the residential construction industry. HUDAC representatives argued that in the vast majority of residential construction projects there is no general contractor. A subcontractor contracts directly with the owner who is either a housing contractor building homes for future purchase or an individual acting either as his own contractor or using the services of his vendor as an agent/contractor. Thus, what is a subcontractor in the trade becomes a contractor for the purposes of the Act. HUDAC submitted that the lack of a general would make it difficult to establish a joint holdback trust account. No "subcontractor" would want to administer the account once his portion of the project was completed and he had been paid. HUDAC also represented that in residential construction, the securing of the holdback is not an issue. There is little progress billing. Usually a particular subcontract is completed within thirty days of commencement which means progress billing is not required. When a subcontractor submits his bill, it is for 100% of the amount of his contract and the statutory period running from the completion of the subcontract marks the time pending release of this 100% and not merely the amount of the holdback. In this context, HUDAC argued that security for the holdback loses its significance. HUDAC urged that what its members wanted was some greater assurance of payment of the contract amount and not just the holdback. The assurance which HUDAC sought was a longer statutory period coinciding more with the billing practices of the residential construction industry. HUDAC described the prevalent billing practices as follows:

> In 1973, as was recommended by the Thompson [sic.] Royal Commission in 1963, the statutory holdback period was increased from 30 days to 37 days. The last 20 years has seen the advent and considerable increase in the use of computers in all areas of accounting. In the past the date of delivery of building supplies was usually the date of invoicing. The time involved in manual posting required that invoicing be spread over the entire work month. Today the practice of major suppliers is to render invoices on a given date of a month and to allow 30 days after the invoice date for payment of accounts. If the last materials are delivered the day after the selected billing date in a month, the invoice for the materials will not be issued for 29 or 30 days and the purchaser will not be expected to pay for another 30 days. It is accordingly recommended that the Act recognize current billing practices by extending the holdback period from 37 to 67 days.

In its first Report the Committee indicated its reluctance to lengthening the statutory period. The longer the statutory period, the longer the parties in the pyramid will be required to wait for the release of the holdback. The Committee also recommended against a different statutory period for the oil and gas industry on the basis that the introduction of a variable in the legislation introduces a factor of complexity. Similarly, the Committee were concerned with the HUDAC proposal for four reasons. First, the substitution of the joint holdback trust account with a longer lien period does not provide protection in the event an owner or a general contractor is insolvent. In the residential construction industry where the owner and the general are often one, the type of protection offered by the joint holdback trust account proposal would prove most useful. Secondly, the Committee was uncertain whether lengthening the statutory period ever provides greater security. No owner will ever release the holdback until after the expiration of the statutory period. If there has been no progress billing, lengthening the statutory period probably means that 100% of the contract price will be delayed until after expiration of the statutory period. The third concern of the Committee was the difficulty in defining the residential sector or defining that portion to which special rules would apply. The definition would necessarily result in some arbitrary distinctions regarding similar work with the resulting pressure to expand the definition and impinge on commercial undertakings. Finally, the Committee remained concerned about the added complexity which this change would bring.

However, the Committee was also impressed with the strength of the arguments on the other side and felt that the proposal should be aired through the vehicle of this Report to allow future decisions to be made. Accordingly, the Committee resolved to recommend that the joint holdback trust account not apply to the provision of services or materials to single family dwellings or duplexes and repairs or renovations, only, to four-plexes or condominium units. The assumption is made that the construction of four-plexes or condominium units would be carried out with a true general contractor resulting in a pyramid making the delay in the release of funds economically difficult.

The Committee resolved that a joint holdback trust account be maintained with respect to all other contracts regardless of dollar value except contracts where the Crown or a municipal corporation was the owner of the property.

With respect to the administration of the joint holdback trust account, the Committee was concerned that in situations where the owner employs a general contractor, as his agent, to employ other contractors to perform work, services and materials, or where the owner acts as his own general contractor, that it would not be sufficient to provide that the owner and the general contractor maintain a joint holdback trust account. Under these circumstances, the Committee resolved that the owner should establish the holdback trust account with a subcontractor of his choice with the provision to make application to the court for assistance or where any person is dissatisfied with the decision of the owner.

Following further submissions from the Saskatchewan Construction Association, HUDAC, the General Contractors Association, P.A. Pulp Company Ltd. and several individuals, the Committee felt that more detail should be provided with respect to the joint holdback trust account proposal.

On the question of interest, the Committee remains of the opinion that the elimination of the requirement to pay interest to sub-trades was necessary to remove one of the strongest areas of criticism of the proposal. From contacts in Manitoba it is apparent to the Committee that many disagreements in the construction pyramid on Manitoba projects now center around the question of interest entitlement, and, furthermore, and perhaps most importantly, the Manitoba

Construction Association cannot point to any reduction in construction costs as a result of lien claimants receiving interest. In the overall structure, lien claimants are not losing any rights by not having interest accrue to them. A lien claimant will continue to be able to ask for interest on delayed payments as part of his contract. The fact that interest actually accruing on the holdback in the holdback trust account does not find its way to a lien claimant does not mean that he will not get interest. Only the administrative burden of actually calculating to whom and in what amount does interest actually earned belong to the lien claimant is removed. Furthermore, the interest actually earned could be less than the amount stipulated in the contract for delayed payments. However, the Committee did agree that the question of interest should be specifically addressed and that the legislation should provide that to whom interest is to be distributed is to be subject to the agreement of the parties and, in the absence of agreement, should accrue to the owner.

Following further discussion the Committee also felt that direction should be provided in the legislation for cheques to issue directly to lien claimants. The Committee confirmed its view that one of the benefits to be felt from the joint holdback trust account would be a quicker release of holdback funds. The owner gains no benefit from the holdback trust account. Interest received will be less than his cost of borrowing and perhaps less than delayed payment charges. This quicker release of funds should be emphasized and hastened by a direction in the legislation that, wherever possible, cheques should be issued directly to the persons entitled thereto. Although this direction would be unenforceable, in the sense that no consequences will follow if cheques are not so issued, it is clearly to the owner's advantage to do it this way to ensure that liens, albeit invalid if the holdback has been properly retained and released, are not registered.

Another issue that the Committee looked at was the need to ensure that the long established practice of mortgagees retaining holdbacks was prevented where a joint holdback trust account is in use. Section 21 of the present Act allows a mortgagee to retain the holdback as the owner's agent. Clearly, this practice would have to be prevented in order to eliminate the possibility of a double holdback.

Recommendations:

1. The holdback should be secured. The method used to secure the holdback is to require the owner to maintain a joint holdback trust account with the general contractor.

2. In any case where there is no general contractor or where the general contractor is the agent of the owner, the joint holdback trust account should be administered in conjunction with one of the subcontractors.
3. There should be power in the court to provide directions as to which contractor is the most appropriate to join with the owner to administer the joint holdback trust account or, on the application of any person affected by the administration of the joint holdback trust account, to make any order the court deems suitable in the circumstances.
4. Interest should be distributed in accordance with the agreement of the trustees and, in the absence of agreement, should accrue to the owner.
5. The trustees should be directed to pay amounts out of the joint holdback trust account, wherever possible, to the persons entitled to receive the holdback.
6. Where a joint holdback trust account is established, mortgagees should be directed not to retain a holdback to prevent the possibility of the construction pyramid bearing the cost of a double holdback.
7. There should be no obligation on the Crown or any municipal body to maintain a holdback trust account.
8. The obligation to maintain a joint holdback trust account should not apply to contracts for services or materials to single family dwellings or duplexes and repairs or renovations, only, to four-plexes and condominium units.

5. Release of the holdback where no lien has been registered.

A number of briefs submitted to the Committee reflect confusion as to whether the holdback can be released prior to completion of the contract. Some writers felt that the present law only allows early release of the holdback upon substantial performance of a subcontract. Others felt that early release was only possible upon substantial performance of the main contract while early release of the holdback on a subcontract required total completion. All who wrote on this issue were concerned that the current rights to lien governed by section 36 of the Act made it impossible for the cautious owner or contractor to release the holdback. Under this heading the Committee considered a number of issues.

A. Whether the owner should be able to pay out the holdback upon substantial performance of the main contract?

The present rule is governed by subsection 20(8) of the Act which provides that the holdback may be paid out "after the expiration of the statutory period". The statutory period referred to is one of the periods set forth in section 36: in the case of a contractor or subcontractor the period is within thirty-seven days after the completion, abandonment or other termination of the contract or subcontract, as the case may be;

in the case of a claim by a materialman the period is within thirty-seven days after the furnishing of the last material; in the case of a claim by a labourer the period is within thirty-seven days after the last day's work was done or services rendered; and in the case of a contract under supervision the period can be one of those already stated or within seven days after a certificate of completion or the refusal of the architect, engineer or other person to issue a certificate.

For those periods linked to completion of the contract, arguably the definition of completion of the contract contained in clause 2(1)(a) being "substantial performance, not necessarily total performance, of the contract" takes one automatically to the rules in subsection 2(2) for determining when a contract is substantially performed, which are based upon use of the improvement and no more than a certain percentage of the work remaining to be done. However, it is clear that the word "completion" in section 36 is required to do double duty depending upon whether there has been a certificate of substantial performance or not. Furthermore, subsection 20(1) which establishes the main rule for obtaining a certificate of substantial performance on supervised contracts, refers only to subcontracts while the balance of the subsections contained in section 20 refer to contracts and subcontracts. The omission of the word "contract" in subsection 20(1) gives the appearance that certificates of completion are only obtainable with respect to subcontracts.

The issue of whether the concept of substantial performance currently applies to the main contract is further complicated in that the time limit for filing liens for the materialman or labourer is not dependent upon "completion of the contract" but upon the last provision of material or performance of the work for which wages are sought. This uncertainty is no better outlined than in the case of Glenway Supply (Alta.) Ltd. v. Knobloch et al., [1972] 6 W.W.R. 513 (Alta. C.A.). In this case, materials supplied sometime after substantial completion of the contract, although trivial in value, were held to extend the statutory period. In the 1983 Bar Admission Course materials at page 33 the following comment appears:

> It is therefore suggested that a person primarily liable on a contract cannot safely pay out the holdback in his hands until the contract has been absolutely completed. This interpretation strips the concept of substantial completion of much of its vigor if not all. A legislative amendment is necessary to clarify the effect of these sections.

The definition of "completion of the contract" was recommended by the Thomson Report. His Honour Judge Thomson also recommended the adoption of what is now section 20 of The Mechanics' Lien Act. Section 20 of the Act first appeared as an amendment in 1971. However, the definition of completion and the rules for determining substantial performance were not inserted until The Mechanics' Lien Act, 1973 was passed.

It appears from an examination of section 36 that the owner, before he releases the holdback, must wait for all periods established by section 36 to expire. This was probably not intended by the Act. The intention was probably that the owner should be able to release the holdback upon substantial performance of the main contract notwithstanding that the lien periods of subcontractors, materialmen and labourers may not have expired. To prevent any injustice that this may cause, a mechanism should have been developed whereby notice of the certificate of substantial performance can be given to those most affected by its issuance and a second holdback fund established for the period commencing after substantial performance of the main contract until total completion for those providing work after substantial performance.

In Ontario, subsection 22(10) of the Construction Lien Act provides that a payer upon a contract retains the holdback until "all the liens that may be claimed against the holdback have expired as provided in Part V". Section 26 provides that each payer upon a contract "may, without jeopardy, make payment of the holdback he is required to retain by subsection 22(1), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V". Section 29 provides that "payments made in accordance with this part operate as a discharge of the lien to the extent of the amount paid".

Section 31 of the Ontario Act sets out when liens expire. Subsection 31(2) provides that the lien of a contractor on a supervised contract expires forty-five days after the earlier of "the date on which a copy of the certificate or declaration of substantial performance is published" and "the date the contract is completed or abandoned". On an unsupervised contract or where there has been no certification the lien of a contractor expires forty-five days after the earlier of the date the contract is completed and the date the contract is abandoned. Subsection 31(3) provides that the lien of any other person on a supervised contract expires forty-five days after the earliest of "the date of publication of the certificate of substantial performance"; the date on which he last supplies services or materials; and the date the subcontract is certified to be completed. Again, on an unsupervised contract or where there has been no certification, the lien of any person other than the contractor expires forty-five days after the earlier of the day he last supplied services or materials and the day the subcontractor was certified to be complete.

Manitoba's subsection 24(1) provides that the person primarily liable for payment under a contract shall deduct 7.5% and retain that amount for at least forty days after the earlier of the giving of a certificate of substantial performance or the contract is complete or abandoned. Subsection 25(1) provides that when forty days have expired after a certificate of substantial performance has been given or the work to be done under the contract has been completed or the contract has been abandoned "the holdback under subsection 24(1) shall be reduced".

The Committee felt that the problems raised by the many briefs to it, namely the briefs from the P.A. Pulp Company Ltd. and the Saskatchewan Association of Architects, could be resolved by providing specifically that the holdback be released on substantial performance of the main contract. This rule would not depend on the present definition of "completion of the contract" in subsection 2(1)(a) but should provide rules, similar to those currently provided, for determining when a contract is complete.

Both the Manitoba and Ontario legislatures have addressed the problem of giving certainty to the owner as to the point at which the holdback may be released. The owner may pay out after a set number of days following substantial performance of the main contract. Provision is made for notice in both jurisdictions. Where it is intended that release is dependent upon "substantial performance" these words are used rather than making reference to "completion of the contract".

Recommendations:

1. The definition of "completion of the contract" should be deleted.
2. An owner should be allowed to release the holdback upon the expiry of a set number of days from substantial performance of the main contract.

B. If the holdback is to be released after substantial performance of the main contract, how is the problem of lien claimants, who provide services or materials after substantial performance, resolved?

As soon as one decides that the concept of substantial performance should apply to the main contract an issue arises with respect to the time period from substantial performance until total completion of the contract. Since further funds will be held back from the funds expended to complete the contract, who is entitled to participate in this holdback fund? Can persons who have provided services or materials prior to substantial completion participate in the second fund?

Under the present Saskatchewan legislation, if one assumes that the concept of substantial performance applies to the main contract, this issue is not addressed. If an owner releases the holdback upon the expiry of thirty-seven days after substantial performance of the main contract or seven days, depending upon one's interpretation of section 36, a lien claimant who has performed work or provided services or materials between the time of the issuing of the certificate of substantial performance and total completion of the contract either is unable to claim or, if he is able to claim, the position of the owner under the present legislation is untenable.

The Alberta Institute of Law Research and Reform in its 1979 Report on "The Builders' Lien Act: Certain Specific Problems" felt that a possible solution to this problem would be to allow a lien claimant to register his lien but if the owner has released the holdback the lien would not attach any funds.

Both Manitoba and Ontario have dealt with this issue by establishing a second holdback imposing the obligation to continue to deduct the holdback from the date the main contract is substantially performed until completion of the main contract in which case only those persons who provided work, services or materials during that period may participate in the fund.

In Ontario, as indicated, subsection 22(1) deals with the basic holdback and provides that the owner shall retain a holdback equal to 10% of the price of the services or materials as "they are actually supplied under the contract or subcontract". Subsection 22(2) establishes the separate holdback for finishing work. Where services or materials remain to be supplied to complete a contract after the day the main contract is substantially performed, the payer upon the contract is directed to retain from the day of substantial performance, a "separate holdback equal to 10% of the price of the remaining services or materials as they are actually supplied under the contract".

In Manitoba, as indicated, subsection 24(1) directs the person primarily liable for payment under a contract to deduct 7.5% of each payment to be made by him in respect of the contract as the work is done or the services are provided or the materials are supplied under the contract and retain that amount for at least forty days after a certificate of substantial performance is issued. Subsection 24(2) provides that "upon substantial performance of a contract" the payer, shall "as the remaining work is done or the remaining services are provided or the remaining materials are supplied under the contract, deduct 7.5% of each payment to be made by him in respect of the remaining work, services or materials".

Section 44 sets out when contractors, subcontractors, and materialmen are entitled to claim against the second holdback.

The Committee resolved to recommend that the owner continue to deduct the holdback from substantial to total completion and only those persons who provided services or materials after the day of substantial performance would be able to claim on the funds deducted from the day of substantial performance until total completion of the main contract.

Recommendation:

The funds deducted or retained by the owner from the day of substantial performance to total completion, will only be subject to the liens of those persons providing services or materials from the day of substantial performance until total completion of the contract.

C. Whether the holdback on a subcontract is to be released after substantial performance of the subcontract?

From an examination of subsection 20(1) of the Saskatchewan Act, it appears that the holdback may be released upon substantial performance of the subcontract. Subsection 20(1) provides that an architect may be required to give a certificate that a subcontract has been completed to his satisfaction. The use of the words "completion of the contract" can, it could be argued, take one to the definition of this phrase which takes the reader to the rules for determining substantial performance. However, at page 34 of the Bar Admission Course materials the following comment appears:

> ...the holdback may be reduced under section 20 for "completed" subcontracts where the work is under the supervision of an architect or engineer. It is likely that completed here means utterly completed since the definition of substantial performance is limited to those cases where the improvement is ready for use or is being used. For example, the excavating subcontractor usually finishes his contract early on in the job. The owner heretofore was required to withhold the proper percentage of this contract until the completion of the prime contract. Now, upon the proper certificate

> the owner may pay out the general contractor entirely with respect to the subcontract thereby reducing the owner's holdback.

This analysis is born out by the Thomson Report which first recommended the adoption of section 20. His Honour Judge Thomson makes this comment at page 36 of the Report:

> Many complaints were made to the Commission that owners and contractors in many cases would not pay over their holdbacks at the expiration of the statutory period but would insist on holding the money back until 30 days after the entire project had been completed. It is easily understood why contractors might wish to do this. The holdback of 20% retained by the owner must be held by him for the statutory period after the completion or abandonment of the contract between himself and the general contractor. If the contractor pays his subcontractor 30 days after he has completed the basement he will have paid out 100% of the contract price for the basement, but can collect only 80% from the owner and will have to wait for the balance of 20% until the whole job is complete which may be a matter of months and in some cases a matter of a year or more.
>
> Both Ontario and Manitoba have adopted provisions to ease the burden on the contractor in such cases. Under subsection (3) of section 11 of the Ontario Act where the contract is under the supervision of an architect on whose certificate payments are made, then the architect upon the completion of a subcontract may issue a certificate of completion and if no lien has been registered the amount of the holdback in the owner's hands will be reduced by 20% or 15% as the case may be, of the amount of the subcontract price. That means that the owner can pay over to the contractor the

> full 100% of the subcontract price and the contractor in turn will then be able to pay the subcontractor the full amount coming to him without having to put up any of his own money for that purpose. Manitoba in 1960 amended its Act by adopting a similar provision.

However, it must be remembered that Judge Thomson only recommended a definition of "completion of the contract". The rules with respect to determining "substantial performance" were added in 1973 two years after section 20 was added to the Saskatchewan Act. Recently, the issue of whether or not substantial performance applies to a subcontract has been dealt with by the Ontario Court of Appeal in the case of Union Electric Supply Co. Ltd. v. Joice-Sweanor Electric Ltd. et al. (1975), 7 O.R.(2d) 227 which case adopted the reasoning of a lower court decision in the case of Otis Elevator Co. v. Commonwealth Holiday Inns of Canada Ltd. (1972), 8 O.R.(2d) 297 (Ont. S.C.). The argument that substantial performance did not apply to a subcontract was based on the fact that the definition of "completion of a contract" referred only to "contract" as did the rules with respect to determining when a contract is substantially performed. The Otis Elevator decision supported by the Ontario Court of Appeal in the Union Electric case held that the concept of substantial performance applies to a subcontract in Ontario. The similarity between the Ontario and Saskatchewan legislation would seem to indicate that this is also the law in Saskatchewan, but the legislation remains unclear.

The new Ontario legislation precludes the concept of substantial performance from applying to a subcontract. The holdback may only be released upon certification of completion of the subcontract. Section 25 provides that "where a subcontract has been certified complete under section 33, each payer upon the contract and any subcontract may, without jeopardy, make payment reducing the holdbacks required by this part". Section 33 provides a mechanism whereby the general contractor can request a certificate of completion where the contract is determined to be complete and a certificate in the prescribed form may be given. Subsection 33(3) provides that "if services or materials are supplied to the improvement under or in respect of a subcontract after the date the subcontract is certified to be completed, those services or materials shall be deemed to have been last supplied on the date of certification". Although subsection 2(3) of the Ontario Act provides rules for determining when a contract is complete, these rules apply only to contracts and not to subcontracts. The consequence of this limitation is that "complete" means totally complete similar to the way the law was prior to 1970 when a definition of complete was added to the Ontario and Saskatchewan Acts. This, coupled with the permissive nature of section 33 and the fact that only the contractor can request a certificate of completion probably means that few certificates of completion will be given in Ontario.

The Manitoba legislation maintains consistency with respect to its rules regarding substantial performance of the main contract and provides that the holdback on a subcontract may be reduced after a certificate of substantial performance of the subcontract has been given and also provides for a basic holdback release and a finishing holdback release.

This issue was considered at some length by the Committee. Some material before the Committee indicated that the practice in the industry was to release the holdback upon the expiry of the statutory period after completion rather than substantial performance of the subcontract. However, this may be based on the definition of substantial performance, and it is only the timing involved, which results in its actual release after completion. However, the Committee was concerned that if the concept of substantial performance were to apply to subcontracts, as in Manitoba, it would be necessary to resolve the issue as to who can participate in the holdback accruing from the date of substantial performance of the subcontract until completion of the subcontract, thereby adding further complexity to the release of the holdback where such complexity is not needed. The Ontario approach did not seem consistent with the Committee's avowed intention to speed and facilitate the early release of the holdback. Without rules for determining completion of the subcontract and a mandatory procedure for obtaining a certificate of substantial performance, the Committee was concerned that there would be few payment certifiers or owners who would be prepared to certify completion of a subcontract. The Committee did not feel this issue could be left unaddressed. For those subcontractors like the mechanical subcontractors or piling subcontractors whose work is completed long before substantial performance of the main contract, it is important to their economic viability to be paid the holdback applicable to their subcontract. Without rules for determining and compelling completion certificates an owner would only act if for some reason he wished to reduce the potential number of liens. The only remedy a subcontractor would have to compel the issuance of a certificate would be to register or give notice of his lien; this would be counterproductive if other remedies could be made available.

On balance the Committee felt that a procedure should be developed whereby the holdback should be released on completion of the subcontract. Completion as it relates to the subcontract should be defined in the same way as it is defined for the contract. It should be possible for a subcontractor to call for the certificate and there should be a cause of action for failing to give the certificate. Of course if substantial performance of the main contract occurred before completion of a subcontract the holdback would be released at the earlier time.

Following release of its "Tentative Proposals" the Committee received two letters from interested parties asking that the holdback for a subcontract be released on the giving of a certificate of substantial performance of the subcontract in the same manner as for the head contract. Again, although one member of the Committee agreed with these submissions, the majority of the Committee felt that early release of the holdback on a subcontract should be dependent on its completion. The Committee did feel that it should be possible to compel a certificate of completion to issue with respect to a subcontract by applying to the court and recommended this change to the certification process as it relates to subcontracts to bring it in line with the procedure on the main contract.

Recommendations:

1. The holdback with respect to a subcontract should be released upon the expiry of the statutory period following

substantial performance of the main contract or completion of the subcontract whichever event occurs first.

2. The means to determine whether a subcontract is completed should be provided by the statute.
3. It should be possible for a subcontractor to compel the issuance of a certificate of completion in the same way as can be done with respect to a certificate of substantial performance.

D. How is substantial performance to be determined for contracts under supervision and contracts not under supervision?

Where a contract is under supervision in Saskatchewan, subsection 20(2) provides that a contractor or subcontractor may demand a certificate of completion in respect of a contract or subcontract from the architect, engineer or other person upon whose certificate payments are to be made which demand shall be in writing and may be delivered to the architect or other person or sent to him by registered mail with a copy to the owner or his agent. The architect or other person has ten days after receipt of the demand to give his certificate. Where the architect fails to provide a certificate of completion an application may be made to a judge under subsection 20(5). Subsection 20(5) requires a demand as a condition precedent to making application to a judge.

Where a contract is not under supervision, Saskatchewan does not currently provide a means whereby substantial performance may be determined.

In Manitoba, with respect to the main contract, subsection 46(1) provides that where a contract requires a payment to be made upon the certificate of a payment certifier, the contractor applies to the payment certifier who has seven days to give a certificate of substantial performance to the contractor and the owner. Payment certifier is defined to mean an architect, engineer, or other person upon whose certificate payments are made under a contract. Where a contract does not provide for payment to be made upon a certificate of the payment certifier, subsection 46(2) provides that the contractor may, and on request of any of his subcontractors, shall, apply to the owner for a certificate of substantial performance and the owner has seven days within which to give a certificate of substantial performance.

Where either the payment certifier or the owner fails to give a certificate of substantial performance, subsection 46(3) provides that the owner or the contractor or any subcontractor or any person entitled to a lien may apply to a judge who may make an order that the contract has been substantially performed. No appeal lies from such an order.

Subsection 46(6) provides the contents of a certificate of substantial performance and a form is also provided.

The procedure with respect to certificates of substantial performance in relation to subcontracts is outlined in subsections 25(5) to (8) of the Manitoba Act. These provisions are almost identical to the provisions in relation to substantial performance of the main contract.

Section 32 of the Ontario Act sets out the rules which govern the certification of substantial performance of a contract. The contractor is entitled to apply for the certificate to the payment certifier and, if there is no payment certifier, the owner and the contractor, who must jointly determine whether a contract has been substantially performed. The certificate must be given in a reasonable time period. Where there is a failure or refusal to certify substantial performance, any person may apply to the court and the court may declare that the contract has been substantially performed.

Like Manitoba, the contents and a form of the certificate are also provided by the Ontario legislation (32(2)). Ontario also provides in subsection 32(3) for a civil cause of action by anyone suffering damage as a result of the failure to provide a certificate of substantial performance.

Since substantial performance does not apply to subcontracts no special rules are made with respect to subcontracts in the Ontario Act.

The Committee felt that the issues addressed by the Ontario and Manitoba legislation in relation to substantial performance should be addressed in a similar manner in the Saskatchewan Act.

Recommendations:

The Act should establish the following rules dealing with substantial performance:

(a) for contracts under supervision, the payment certifier should be required to certify substantial performance of the contract;

(b) for contracts not under supervision, the owner and the contractor jointly should be required to certify substantial performance;

(c) the time within which a certificate must be provided should remain as it is in the current legislation at ten days after receipt of a demand by a contractor;

(d) where the payment certifier or owner/contractor fail to certify substantial performance, access to the courts should be allowed;

(e) the contents and form of the certificate should be prescribed by regulation;

(f) a cause of action should be established against a person required to give a certificate of substantial performance who fails to do so within the time limited and who as a result of his failure causes loss or damage.

E. Should there be a requirement to publish the certificate of substantial performance and should the statutory period run from publication?

Section 47 of the Manitoba Act provides that a certificate of substantial performance is not effective unless it has been given to the contractor and the owner and, where it relates to a subcontract, to the subcontractor. Subsection 59(1) provides that notice of substantial performance must be given by the owner to all persons doing work, providing services or supplying materials who have requested the owner in writing, by personal service with a return address, to give them a copy of the notice. This does not apply to an individual who orders work in relation to a structure not exceeding a prescribed value which structure is used by the owner and his spouse for single family residential purposes.

The time to lien in Manitoba does not run from the time of publication of the certificate of substantial performance. The time to lien runs from the date of substantial performance.

Clause 32(10) of the Ontario legislation provides that a certificate of substantial performance has no effect until a copy of the certificate has been published. Clause 32(5) requires the contractor to publish a copy of the certificate once in a construction trade newspaper and where he fails to do so within seven days of receiving a copy of the certificate, any person may publish a copy of the certificate. Rules are also made with respect to where the court orders substantial performance and publication of the court order.

Unlike Manitoba, the position in Ontario is that the liens of contractors and other persons expire only at the conclusion of a time period which commences at the time a copy of the certificate of substantial performance has been published.

The Committee felt that it was important that the issuing of a certificate of substantial performance be brought to the attention of those persons most affected by it. However, the Ontario approach which requires the actual publication of the certificate in a construction trade newspaper may not be an acceptable solution in Saskatchewan. The fact that Saskatchewan does not have a construction trade newspaper or one paper with universal publication in the province would make newspaper publication impractical. The Manitoba approach which requires the owner to give notice to those persons who have requested it would seem to be preferable. In addition, the Committee felt that the posting of the notice on the job site would be useful. With respect to whether the statutory period should commence with publication, it was felt that this would add a degree of uncertainty as to the length of the statutory period and could also unduly lengthen that period. For example, if one adds together all of the time periods in Ontario the holdback may not be released until 69 days after substantial performance. Accordingly, the Committee decided that the statutory period should commence when the certificate of substantial performance has been given to the owner and the contractor or subcontractor, as the case may be.

Recommendations:

1. The payment certifier or owner should be required to give a copy of the certificate of substantial performance to the

contractor and to those persons requesting it and to post the certificate in a prominent place on the job site.

2. Publication should not be a factor in determining the commencement of the statutory period.
3. The statutory period should run from the giving of the certificate to the owner and the contractor or subcontractor, as the case may be.

F. Whether the rules with respect to determining substantial performance require modification?

The present rule in Saskatchewan is contained in subsection 2(2) as follows:

> 2(2) For the purposes of this Act, a contract shall be considered to be substantially performed:
>
> (a) when the improvement or a substantial part thereof is ready for use or is being used for the purpose intended; and
>
> (b) when the work to be done under the contract is capable of completion or correction at a cost of not more than:
>
> (i) three per cent of the first $250,000 of the contract price;
>
> (ii) two per cent of the next $250,000 of the contract price; and
>
> (iii) one per cent of the balance of the contract price.

Subsection 2(1) of the Manitoba Act reads as follows:

> 2(1) For the purposes of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when
>
> (a) the structure to be constructed under the contract or sub-contract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
>
> (b) the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than
>
> (i) 3% of the first $250,000.00 of the contract price,
>
> (ii) 2% of the next $250,000.00 of the contract price, and
>
> (iii) 1% of the balance of the contract price.

You will note the difference between the Manitoba section and the Saskatchewan section. First, it is clear that the Manitoba legislature intended that the concept of substantial performance should apply to sub-contracts. Secondly, instead of referring to the improvement being ready to use, the Manitoba section refers to "the structure to be constructed under the contract or sub-contract or a substantial part thereof".

Subsection 2(1) of the Ontario Act provides as follows:

> 2(1) For the purposes of this Act, a contract is substantially performed,

> (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
> (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
>> (i) 3 per cent of the first $500,000 of the contract price,
>> (ii) 2 per cent of the next $500,000 of the contract price, and
>> (iii) 1 per cent of the balance of the contract price.

This new definition clearly applies only to contracts. The words "shall be deemed to be substantially performed" are not found in the new definition. The percentages of value of uncompleted work have been increased. Finally, the definition states that this value can apply only to completion costs or correction of known defects to prevent abuse of the definition by an owner refusing to release the holdback because of some concern for hidden defects in the work done.

With the Committee's decision to confine the concept of substantial performance to the main contract, no modifications need to be made to this definition to accommodate substantial performance of a subcontract. This is one of the major issues under the present legislation. However, the Committee felt that given the inflationary effect of the passage of time, the amounts should be increased and the limits set by the Ontario Act would be acceptable. Removal of the presumptive effect of the present use of the words "shall be considered to be substantially performed" would give more certainty to the statute and remove some of the ill effects of the Glenway decision referred to earlier. Similarly, the reference to the correction of known defects would forestall retention of the holdback only for the imaginary fears of the owner.

Recommendations:

The present rules with respect to determining substantial performance should remain with the following modifications:

(a) the amounts should be increased from $250,000 to $500,000;

(b) instead of the contract being presumed to be substantially performed upon the happening of events, the contract should be declared to be substantially performed upon the happening of the events listed;

(c) determination of the value of the amount of work to be done should be specifically dependent upon correction of known defects only.

G. Whether a definition of "abandoned" should be inserted in the Act?

One other event which triggers the commencement of the time for determining when the holdback may be released and for determining when liens are required to be registered is the "abandonment" of a project; see subsections 20(8) and 36(1) of the present Act. Following release of its "Tentative Proposals" the Committee was asked to consider whether a definition of "abandoned" should be provided. The Committee noted that no other jurisdiction had defined "abandoned" in the context of its mechanics' lien legislation but that the British Columbia Law Reform Commission had reasoned that a more objective definition of abandonment was required to replace the common law definition which appears to require an element of intention to abandon. The Commission proposed the following definition:

> "Abandonment" means the expiry of a period of 30 days during which no work has been done in connection with the contract or improvement, as the case may be, unless the cause for the cessation of work was and continued to be a strike, lockout, sickness, weather conditions, holidays, order of a Court, a shortage of materials, or other such like cause; and "abandoned" has a corresponding meaning.

The case most often cited to provide a definition of abandoned is Anderson v. Fort William Commercial Chambers Ltd.

(1915), 25 D.L.R. 319 (Ont. C.A.). In this case the lien claimants left the job site believing their work to be done but the owners refused to accept the contracts as completed. Later, when the lien claimants decided they were wrong, following an arbitrator's decision, they returned to the site and completed the work. Their subsequent lien claim for work done prior to the award was contested on the basis that they failed to register their claim within thirty days of having abandoned the contract. Riddell, J. at page 321 said:

> But what took place in the present instance was not an "abandonment" of the contract. An abandonment of the contract contemplated by this section is, not leaving a work under the belief that the contract is completed, but, knowing or believing that the contract was not completed, declining to go on and complete it. Nothing of the kind was done here. The plaintiff, on it being decided that he was wrong, went on and finished his work. There never was any intention on his part to refuse to complete a contract which he knew or believed was not completed. That being so, I think that sec. 22(1) does not apply. The contract was not completed or abandoned.

This decision was followed in B.A. Robinson Plumbing & Heating Ltd. v. Stewart (1961) 28 D.L.R. (2d) 167 (Ont. C.A.) where again the court held that leaving the job under the belief that the job was completed was not an "abandonment" of the contract. A recent Supreme Court of Canada decision is Elizabeth Townhouses Ltd. et al. v. Dieleman Planer Co. Ltd., [1975] 2 W.W.R. 752. In this case work ceased due to financial difficulties and pending a sale from the trustee in bankruptcy to a purchaser who completed the project approximately four months after the cessation of work. Quoting from the British Columbia Court of Appeal decision Judson, J., speaking for the court, found that the contract had not been abandoned:

> It is clear that work ceased, but in my view, cessation of work and abandonment are not necessarily co-existent. In order to constitute abandonment a cessation of work would have to be permanent in the sense that it was not intended to carry the project to completion. Work on this project ceased before December 10th but the evidence is clear that it was intended that work be resumed when the financial problems had been overcome. It was likely that those problems would be overcome because the cost of completion was more than offset by the funds remaining to be advanced on the mortgage.
>
> ...'Nowhere throughout the evidence can I discern any intention by anyone able to control the destiny of the project to abandon the improvement, nor was there in fact such an abandonment as I construe that word. It is true that there was a short cessation of work on construction of the uncompleted portion of the improvement but this, I think, is only one factor to consider and an insignificant one in comparison with the paper work and other efforts proceeding continuously to enable actual construction to continue. A change in ownership of the improvement does not in itself constitute an abandonment, nor does a mere cessation of work'.

Faced with these decisions, the Committee felt that it could postulate a number of fact situations where a slight twist to the facts could result in a cessation of work for a period in excess of thirty days for reasons not contemplated in the definition of "abandonment" found in the British Columbia Report. The Committee also felt that it would not be possible to provide an exhaustive list without introducing a factor of "intention to abandon" which is already present at common law. Any certainty in this area would likely be to the advantage of the owner and to the detriment of lien claimants. Accordingly the Committee decided not to recommend a definition of "abandoned".

H. Whether on large contracts special rules should be developed with respect to the release of the holdback?

The Committee received a couple of briefs urging that where contracts are of a certain value, it should be possible to release the holdback if no liens are registered on the annual anniversary of the commencement of the contract. It was explained to the Committee that on these larger contracts the carrying charges for the holdback are a hardship on the owner and all parties from whom a holdback is retained.

The rules with respect to allowing the payment of the holdback on completion of the subcontract should alleviate the above problem but only in a small way. The Committee considered whether it would be possible to release the holdback as requested. The Committee felt it could be argued that problems most often arise in the latter stages of a project and that early release would reduce the fund available to assist lien claimants. However, the Committee also felt that early release may prevent some problems and, with proper notice of the release being given, lien claimants would come forward at an earlier time. On balance, the Committee felt that in light of the other recommendations that were being made it would be important to try an earlier release policy to assess its workability.

In its "Tentative Proposals" the Committee suggested that the amount of the value of the contract for which there could be early release would be left to the regulations. The Committee also sought response as to what this amount should be. Several interested groups felt that at least a minimum amount should be specified in the legislation to provide a clearer idea of the intent of the section and that this amount should be capable of being increased by the Lieutenant Governor in Council. The amount, the Committee was advised, should be large enough to catch the major projects like hospital construction or the construction of a power plant. The figure suggested was 25 million dollars. The Committee agreed with both suggestions.

Recommendation:

It should be possible to release the holdback on contracts, the value of which exceeds 25 million dollars or such greater amount as may be prescribed, on the yearly anniversary of when services or materials are first provided.

6. Whether the owner should be liable for deficiencies in the holdback?

In Saskatchewan, the owner is contractually liable to his contractor for any non-payment of the contract price including the holdback when it becomes due and payable. If the owner fails to retain the holdback and the owner's interest in the land is less than the amount of the holdback only the contractor can recover a judgment against the owner for the deficiency. Lien claimants are unable to recover a judgment against the owner for any deficiency in the holdback. To rectify this situation, Ontario proposed the following section:

> 23(1) An owner is personally liable to those lien claimants who have valid liens against his interest in the premises to the extent of the holdbacks that he is required to retain under this Part.

The Committee felt that a section like this one was even more important where the owner was required to maintain a holdback trust account to provide incentive for him to do so.

Recommendation:

The owner should be liable for any deficiencies in the holdback to any lien claimant.

7. Whether the legislation should allow alternatives to depositing the holdback in a joint holdback trust account?

A. Are letters of credit a viable alternative to the joint holdback trust account?

The alternative to the holdback proposed by more than one brief to the Committee was to allow the owner to take back an irrevocable letter of credit in exchange for the earlier release of the holdback. If the other recommendations contained in this report are accepted, it should not be necessary to use letters of credit to secure early release of the holdback. Under the present legislation the confusion which surrounded the issue of whether the concept of substantial performance applied to the main contract, perhaps, dictated the use of letters of credit to give the owner security. In addition to early release based on substantial performance, it will also be possible to have an annual release of the holdback on large projects.

As an alternative to the joint holdback trust account, a letter of credit would have to be taken as soon as services and materials were provided. It would have to be either taken for the full amount of the holdback or a letter of credit would have to be issued as payments are made on the contract. The cost for a letter of credit varied for each bank contacted. Some of the banks indicated the cost to be 1% per annum with an application fee and a draw fee varying from $20 to $65.

In order for a letter of credit system to supplant the requirement to maintain a holdback trust account it would have to provide the same protection for lien claimants. In the event of default, it would have to be claimable by lien claimants in the event that the land was insufficient to meet all the claims. The letter of credit would have to remain effective for the life of the contract and until all liens expired or were discharged. There could be no set off. Finally, letters of credit would have to be readily available. On this latter point, it may be useful to quote from the brief prepared by the Saskatchewan Committee of the Canadian Bankers' Association:

> As a matter of practice, most of the banks represented on the Saskatchewan Committee, [Canadian Bankers' Association] are extremely reluctant to issue letters of credit to replace the statutory holdback. Such an arrangement is undertaken only in exceptional circumstances or for a very valuable and reliable customer. A variety of reasons were advanced to support this reluctance. For example, it was felt that the amount of the letter of credit must form part of the credit available to the owner and it would therefore, reduce the owner's available credit for loans to the point where the owner may not be able to finance a project. It was also felt that the time and administration involved in setting up such an arrangement would not be worthwhile in most instances. And, finally, it was felt that the holdback portion of a contract represents the highest risk area and in most cases it would be very difficult to justify replacing this with a letter of credit.

On balance the Committee did not think that letters of credit could be seen as an alternative to establishing a joint holdback trust account. By its very nature, a letter of credit would have to be presented by the person for whose benefit it was provided; i.e., the owner or the contractor, which in the event of default by either of these parties, may be an impossibility. The evidence before the Committee indicated that the life of a letter of credit does not exceed one year which would not be satisfactory. Without legislating their availability, it does not appear that they are available to all persons which would put some contractors in a better position than others.

Following release of its first Report, the Committee again looked at this issue and reaffirmed its position. The Committee noted that letters of credit are used by some of the large corporate owners but felt that the legislation does not preclude their continued use. An owner may decide to release the holdback early. To provide himself with security he may demand a letter of credit from his general contractor payable to himself, in the event that there are lien claims. This can be a fairly safe way of lowering tendering costs, but with the risk remaining with the owner and not the lien claimant. The Committee felt that the parties to a transaction would be better able to tailor the use of letters of credit to meet specific needs than the legislature would be able to provide a general legislated scheme which would have to be applicable in all cases.

B. Whether a labour and material bond could replace the joint holdback trust account?

In considering any alternative to the holdback trust account, it must be remembered that, ultimately, the holdback in the owner's hands is available to all of the tiers in the construction pyramid. This means that in the default of a sub-subcontractor, his labourers and materialmen can look to the holdback retained by the owner with respect to the subcontract involved. Although theoretically it is the holdback retained from the subcontractor above the sub-subcontractor, as has been discussed, this holdback is notional and is represented in the total holdback in the owner's hands as the percentage payable to the subcontractor.

With a labour and material payment bond taken by a contractor, the bonding company guarantees to the owner that the persons contracting with the contractor will be paid. It does not ensure that all persons in the construction pyramid will be paid. In order for the labour and material bond to be an alternative, a bonding system would have to be developed which would be multi-tier in structure. The bonding industry would have to be prepared to guarantee not only the financial solvency of the contractor but of each other payer as well. In all likelihood this would mean that a bond would have to be obtained from every payer in much the same way as the legislation currently requires each payer to maintain a holdback. Unfortunately unlike with the holdback system, there could not be notional bonding. Each payer would have to incur the cost of the bond.

The cost of bonding alone would not have deterred the Committee from pursuing this course. The holdback too must be financed. If bonding meant payment of claims without extensive litigation, the cost could be justified. However, the Saskatchewan experience with bonding under The Public Works Creditors' Payment Act would seem to indicate that, even for those persons considered to be benefitted by the bond, technical defences often were successful in avoiding payment. The Committee felt that the joint holdback trust account, if properly maintained, would obviate the necessity for extensive litigation as to liability.

One scheme of bonding which the Committee looked at should be mentioned. In the Construction Lien Act, recommended for adoption by all states in 1980, by the National Conference of Commissioners on Uniform State Laws, section 5-211 provides that no lien attaches to land if the owner or contractor has procured a bond obligating the surety company to pay all sums due to the construction lien claimants. If notice of the bond is registered against the land, no claim of lien may be subsequently registered. The penal sum of the bond is fifty per cent of the contract price to a maximum of $2,500,000. Again, the availability of such a bond in Saskatchewan may be unlikely at a reasonable cost. However, with the complexity of the Committee's recommendations regarding the residential construction industry, this type of bond may be an option worthy of further consideration as a substitute to both the joint holdback trust account and the special statutory period for residential construction.

Recommendation:

Letters of credit and labour and material payment bonds should not be legislated as alternatives to the joint holdback trust account.

PART IV

REGISTRATION, EXPIRY, DISCHARGE AND VACATING OF LIENS

1. Whether the time period for registering a lien should be increased?

As has been noted earlier, section 36 of the Saskatchewan Act establishes a statutory period of 37 days from the happening of a specified event for contractors, subcontractors, materialmen and workers to register a claim of lien. The statutory period for liens in relation to oil or gas wells is 60 days.

Two briefs submitted to the Committee focused specifically on the statutory period. The Saskatchewan Construction Association recommended an increase to 40 days while HUDAC, as already indicated recommended a general period of 67 days, or the possibility of a special period of 67 days for the residential construction industry. As has already been indicated the Committee is recommending for discussion purposes a 67 day statutory period for a portion of that industry. This Part discusses the statutory period generally. The time periods in the other provinces are as follows:

(a) British Columbia, section 23

(i) for the contractor or subcontractor - 31 days after the contract has been completed or abandoned;

(ii) for the materialmen - 31 days after the contract has been completed or abandoned;

(iii) for a workman - 31 days after the last work is done but no workman shall be held to have ceased work until the completion of an improvement if he has in the meantime been employed by the same contractor;

(iv) for liens in relation to mines and quarries - 60 days;

(b) Alberta, section 30

(i) for the contractor or subcontractor - 35 days after completion or abandonment;

(ii) for materialmen - 35 days after the last materials are furnished;

(iii) for services - 35 days after performance of the services is completed;

(iv) for wages - 35 days after the completion of the work;

(c) Manitoba, section 43

(i) for the contractor - 40 days after the substantial performance or abandonment of the contract;

(ii) for the subcontractor - within the period for the contractor or within 40 days after the substantial performance or abandonment of the subcontract whichever first occurs;

(iii) for materials - within the period for the contractor or within 40 days after the last materials supplied whichever first occurs;

(iv) for services - within the period for the contractor or within 40 days after the completion of the provision of the services;

NOTE: These time periods are repeated for the holdback retained after substantial performance.

(d) Ontario, section 31

(i) for the contractor - 45 days after the date on which a copy of the certificate of substantial performance is published or the date the contract is completed or abandoned, whichever is earlier;

(ii) for any other person - the earlier of 45 days after publication of the substantial performance certificate, or when materials are last supplied or where a subcontract is certified complete, the date on which it is certified complete for persons claiming under the subcontract;

NOTE: For the period after substantial performance certification or where there is no such certification, the lien of a contractor expires 45 days after the contract is completed or abandoned whichever is earlier. The lien of anyone else expires 45 days after he last supplied services or materials or where a subcontract is certified complete, the date of certification for persons claiming under that subcontract, whichever is earlier.

(e) Nova Scotia, section 23

(i) for the contractor or a subcontractor - 45 days after completion or abandonment;

(ii) for materials - 45 days after furnishing last material;

(iii) for services - 45 days after completion of the service;

(iv) for wages - 45 days after the last work is done;

(f) New Brunswick, section 24

(i) for the contractor or subcontractor - 60 days from completion or abandonment;

(ii) for materials - 60 days from last furnishing;

(iii) for services - 30 days from completion of the services;

(iv) for wages - 30 days from doing the last work;

(g) Prince Edward Island, section 25

(i) for the contractor or subcontractor - 60 days from completion or abandonment;

(ii) for materials - 60 days from last furnishing;

(iii) for services - 60 days from completion of the services;

(iv) for wages - 60 days from the doing of the last work;

(h) Newfoundland, section 23

(i) for the contractor or subcontractor - 30 days after completion or abandonment;

(ii) for materials - 30 days after last furnishing;

(iii) for services - within 30 days after completion of the services;

(iv) for wages - 30 days after last work was done.

The Committee noted that the lien period contained in section 5-207 of the Construction Lien Act recommended by the National Conference of Commissioners on Uniform State Laws, for all lien claimants, is 90 days after a claimant has finally furnished services or materials.

In considering the appropriate general period the Committee had in mind that there should be, if possible, one main date, from which all liens should run. It should be irrelevant to the selection of this date that some materials had been completely supplied at some time prior to this date.

The Committee felt that the approaches adopted by the other provinces, which provide that the lien period for a materialman expires when he has last supplied, should not be adopted for two reasons. First, the lien period of the materialman could expire at some time previous to the release of the holdback. Secondly, it requires the parties, and the court, ultimately, to determine many different dates in order to ascertain who is entitled to claim. Leaving aside the question of completion certification of a subcontract, the Committee felt that where a certificate of substantial performance of the contract has been given, all liens should expire a set number of days after the substantial performance certificate has been given. Where no substantial performance certificate has been given, all liens should expire a set number of days after the earlier of the day the contract is completed or the contract is abandoned. For those persons claiming through a subcontract which has been certified to be complete, their liens should expire a set number of days from the earlier of subcontract completion or the events, just mentioned, in relation to the main contract.

With this policy decision, it becomes possible to consider a general time period which is less than that advocated by HUDAC. The Committee was very sympathetic to the HUDAC brief if on the basis of the present law liens of materialmen or servicemen expired a set number of days from last supply. However, with one date for all liens to expire which is readily ascertainable, the concerns of HUDAC should be alleviated. It is noted that this means that more valid liens are in existence at the time of default, but with the other changes recommended by the Committee this should not be a problem. Also it must be pointed out that with the decision to have time run from the date the substantial performance certificate is given, a number of additional days from substantial performance in fact are added to the time period. On this basis the Committee felt confident in recommending a time period of 45 days.

With respect to liens in relation to oil or gas wells, the Committee was advised by the Canadian Petroleum Association that it would have no objection to the standardization of the lien period. In the interests of establishing fewer periods, the Committee resolved to eliminate the distinction between liens for oil and gas and construction projects.

Recommendations:

1. The liens of all persons for services or materials provided before a substantial performance certificate is given should expire 45 days after:
   (a) the date on which a copy of the substantial performance certificate is given;

(b) the earlier of the date the contract is completed or abandoned where no substantial performance certificate is given;

(c) the date a subcontract is certified to be complete, for persons who have provided services or materials under the subcontract.

2. The liens of persons for services or materials provided after a substantial performance certificate is given should expire 45 days after the earlier of the date the contract is completed or abandoned or a subcontract is certified complete.
3. The time period for registering a lien in relation to an oil or gas well should be the same as the statutory period for other liens.

2. Whether it should be possible to register a lien after the statutory period?

Subsection 37(2) of the Saskatchewan Act provides as follows:

> 37(2) A claim of lien may be registered and an action may be commenced after the expiration of the statutory period and the lien is valid except as against:
> (a) intervening parties who become entitled to any estate or interest in

> or a lien or charge upon the land whose claim with respect to the land is registered or protected by the registration of a caveat prior to the registration of the first mentioned lien; or
>
> (b) an owner, mortgagee, contractor or subcontractor in respect of payments made in good faith to a contractor, subcontractor or lienholder after the expiration of the statutory period and before any claim of lien is registered and notice thereof is given in writing to the owner, mortgagee, contractor or subcontractor, as the case may be.

A similar subsection exists for Crown projects: see subsection 63(2). This subsection is peculiar to Saskatchewan. In all other Canadian jurisdictions, liens expire at the end of the statutory period. The ability to register after the statutory period has sparked a great deal of litigation in Saskatchewan: Smithson et al. v. M.L. Plumbing & Heating Ltd. et al., [1977] 3 W.W.R. 422 (Sask. C.A.), Rasmussens' Ltd. v. Melville Country Club, [1977] 4 W.W.R. 382 (Sask. D.C.), to name two recent cases, and has also made it very difficult, in a court action, to determine if all claimants are before the court. The justification made by the Thomson Report for the retention of this section is that it is a boon to the retail lumber companies who allow farmers long periods of credit on the basis that, in the event of default, the company will be able to lien at any time. Many of the briefs submitted to the Committee were concerned about the uncertainties which this provision inserted into the system. HUDAC also was concerned that there be a definite expiry date but was supportive of the retail lumbermen's position.

On balance, the Committee felt that there should be no ability to register after the statutory period. The Committee could not accept the justification given for the retention of subsection 37(2). For those persons contracting directly with the owner it is easier to establish his credit worthiness and there are other remedies, based on contract, which are available. The confusion and uncertainty which subsection 37(2) creates was not worth its retention for the industry as a whole.

Recommendation:

There should be no ability to lien after the statutory period.

3. Whether the present methods of preserving a lien i.e., registration for non-Crown projects and giving a claim of lien on Crown projects, are satisfactory?

Subsection 30(2) sets forth the contents of a claim of lien as follows:

30(2) The claim of lien shall set out:

- (a) the name and address of:
    - (i) the person claiming the lien;
    - (ii) the owner or the person whom the claimant or the agent of the claimant believes to be the owner; and
    - (iii) the person for whom the work was or is being done, the services were or are being rendered or the materials were or are being furnished;
- (b) the date upon which the last work was done, services rendered or material furnished, or where the claim is registered before the work, services or furnishing of material is completed, the time within which the work is to be done, services are to be rendered or material is to be furnished;
- (c) a short description of the work done or being done, of services rendered or to be rendered or of materials furnished or to be furnished;
- (d) the sum claimed as due or to become due;
- (e) a description, sufficient for registration, of the land and estate or interest therein to be charged; and
- (f) an address for service within the province of the lienholder.

It must be noted that if the Committee's recommendations with respect to the statutory period are accepted, it will not be necessary for a lien claimant to state the date upon which the materials or services were or are to be last provided.

Clause 30(2)(d) requires the claimant to specify the sum claimed as due or to become due. The Committee felt that if mechanisms developed to enable the free flow of funds were to be effective, it should not be possible for a lien claimant to claim more than an amount that was owing to him at the time of registration. If the owner is to be able to retain an amount due with respect to a registered lien, he should not be required or allowed to retain more than the amount due to a claimant. Although this means that a lien claimant may have to lien more than once, this was preferable to allowing a lien claimant to impede a construction project by claiming more than was due to him.

Although clause 30(2)(f) coupled with The Interpretation Act requires a lien claimant to provide an address for service in the Province of Saskatchewan, the Committee felt that any address for service should be sufficient.

Subsection 62(6) sets out the contents of the notice of the claim given to the Crown. The differences between the claim of lien described in section 30 and the section 62 notice are that the latter does not require the name and address of the owner or, since the land cannot be charged, a statement of the estate or interest to be charged. The Committee felt that where it was possible to do so the procedure with respect to claims against the Crown should be the same as the procedure involving private land owners. In this regard, the Committee resolved to prescribe one form of claim of lien for both private and public property.

Recommendations:

1. A claim of lien should not require a statement of the last supply of services or materials.
2. A lien claimant should only claim the amount due to him at the time of registration.
3. The lien claimant should be able to provide any address for service both within and without Saskatchewan.
4. There should be one claim of lien form for both public and private improvements.

4. Whether a means should be developed to prevent or deter the registration of non-existent liens or liens for grossly exaggerated amounts?

There can be no doubt that the registration of a claim of lien is a powerful tool in the hands of a lien claimant who is owed contract money. However, it can also be an instrument of blackmail where a lien claimant is not entitled to lien and does so or where a claim of lien is registered for an amount much greater than that actually owed. Due to delays in court procedure the owner may be forced to pay funds which he is not required to pay in order to clear his title.

The Committee is recommending a number of ways in which liens may be removed more quickly from titles, but it also felt that some deterrent to the registration of spurious claims should be legislated.

In Ontario, s. 35 and Manitoba, s. 40(1), a cause of action is established against persons registering non-existent or grossly exaggerated claims.

Although this type of cause of action is not codified in any other statutes in Canada, there probably presently exists such a cause of action as part of our common law. In Guilford Industries Ltd. v. Hankinson Management Services Ltd., [1974] 1 W.W.R. 141 (B.C.S.C.) the court found that the filing of liens for outrageous sums for which there is no legal foundation was an abuse of the Court's process and awarded $50,000 plus $10,000 by way of exemplary damages. There is also a cause of action for slander of title that may be applicable. However, legislating a cause of action would bring the issue more directly to the attention of the construction industry and it would also be possible to allow the cause of action for any person and not just aggrieved owners.

The Committee also reviewed with approval clause 88(1)(b) of the Ontario Act which empowers the court to award costs against the solicitor or agent of any party who has knowingly participated in the enforcement of a lien where it is clear that the claim for lien is without foundation or is for a grossly excessive amount.

Recommendation:

The legislation should deter the enforcement of non-existent claims or claims for grossly exaggerated amounts.

5. Should a preserved lien expire if no action is commenced or, if an action is commenced, if the matter is not set down for trial?

In Saskatchewan, when notice of lien is given to the Crown, the lien ceases to exist on the expiration of 90 days after the day the notice was given or 60 days after the expiration of the statutory period, whichever is later, (see s. 63(3)). No comparable provision exists for liens on private projects. One case that would suggest that the lien claimant must pursue his case with some diligence is Western Tractor and Equipment Company Limited v. Biddell, Saskatchewan Cement

Corporation Ltd. et al., [1972] 4 W.W.R. 687 (Sask. D.C.) where the trial judge dismissed an action on the basis that it would be an abuse of the court's process to permit the plaintiff to proceed after an unexplained delay of approximately 15 years. However, in this case an action had been commenced, the delay inordinate and yet the parties still had the expense of a court proceeding to receive the trial judge's decision.

The Saskatchewan Architects Association urged the Committee to eliminate the distinction between public and private owners and provide a means whereby liens that are not pursued may expire.

The precedent which exists in Saskatchewan with respect to liens on public projects has existed for some time for both public and private projects in most jurisdictions in Canada. The time period varies. In British Columbia, subsection 26(1) requires an action to be commenced and a certificate of lis pendens registered in the Land Registry and in the Mining Recorder's Office not later than one year from the date of filing of the claim of lien. In Manitoba, subsection 49(2) provides that every registered lien ceases to exist after the expiration of two years after the date of registration unless an action is commenced and a certificate of lis pendens registered. In Ontario, subsection 36(2) states that a lien that has been registered or given to the Crown expires 45 days after the last day on which the lien could have been registered or given unless a certificate of action in the prescribed form is registered. Section 27 of the New Brunswick Act provides that filed liens cease to exist 90 days from filing or after the expiry of any period of credit unless an action is commenced and a certificate of lis pendens filed. In Alberta, a registered lien ceases to exist unless an action is commenced and a certificate of lis pendens registered within 180 days after the registration of the lien.

Manitoba, Prince Edward Island, British Columbia, and Saskatchewan have what is called the "notice to lapse" procedure. The owner, or, in Saskatchewan, the registrar, sends a notice to the lien holder requiring him within 30 days to commence action or, if he fails to do so, the lien will be removed. Although it can be argued that the notice to lapse procedure is an alternative to requiring an action to be commenced within a set period, in a system which only has the notice to lapse procedure, liens can remain on titles for many years until the owner takes some active step which may result in an action being commenced just to, initially, meet the time periods. In its "Tentative Proposals" the Committee expressed the opinion that if the lienholder was required to commence his action within a set time period, an owner could wait until this time had elapsed before he requested a notice to lapse or made an ex parte application in chambers to have the lien vacated. The onus would be shifted somewhat to the lienholder to ensure that he has a valid claim before he registers and that he pursues it. If the time is long enough to ensure proper consultation with counsel, there may be fewer actions commenced. On this basis, the Committee recommended in its "Tentative Proposals" that all liens expire 180 days after registration, or in the case of Crown projects, 180 days after the lien has been given to the appropriate agency, unless an action is commenced and notice registered or given.

Strong opposition to this recommendation was received from HUDAC on behalf of its members. Others felt that the balance between owners and lien claimants may have shifted with this recommendation. The view was expressed to the Committee that with residential construction the amount of a legitimate claim may not warrant a court action but by registering a lien and negotiating with the owner, a settlement can usually be reached. If liens expire within 180 days of registration it would impede negotiations and force the commencement of an action. The Committee had difficulty resolving this issue. Clearly, if a lien expires within 180 days of registration unless an action is commenced, the owner can more readily remove spurious claims and funds are not improperly withheld.

On the other hand if a lien is registered it is unlikely that an owner in the midst of a project could wait for the lien to expire. Some steps would have to be taken to secure its removal, in most cases, in order for the project to continue. Where an owner will wait for liens to expire is towards the end of the project or where the owner was financing his own construction. If this is the case, the Committee felt that liens should not expire within 180 days of registration. The Committee also felt that it may not be appropriate to make such a change until the industry was more familiar with the rules that were being recommended in relation to the statutory period for registration. Accordingly the Committee resolved that there should be no expiry period for liens that are registered and for which no action is commenced.

The Committee then turned to consider whether the legislation should require a lienholder to prosecute his claim with due diligence by providing that where an action has been commenced the lien ceases to exist unless the matter is set down for trial within a set period, of, for example, two years from commencement of the action. As mentioned, in Saskatchewan, the mechanism to compel a lienholder to pursue his claim is the notice to lapse procedure. If the lienholder registers the commencement of action, the only mechanisms existing to move the action along are contained in the Rules of

Court. Until such time as the action is discontinued or judgment is given in favour of the owner, the lien and notice of the commencement of action remain on the title.

Again, in some other Canadian jurisdictions a lienholder is required to pursue his claim with due diligence. Subsection 33(2) of the Alberta Act provides that if no trial has been held within two years from the date of registration of the certificate of *lis pendens*, any interested party may apply on notice to the court to have the certificate vacated and all liens depending on it discharged. In Ontario, section 37 provides that a lien for which an action has been commenced expires two years after the date of the commencement of the action unless a day has been fixed for trial or the matter has been set down for trial. An application may be made either *ex parte* or on notice to obtain an order vacating an expired lien. Newfoundland legislation is similar. Manitoba does not have such a section.

The Committee felt that a provision which required a lienholder to pursue his claim would be useful. If a lienholder has not set his action down for trial within two years of commencing his action it would be possible to develop a mechanism whereby the owner could vacate the lien. This would go some way to meeting the criticism of the construction industry that the resolution of mechanics' lien issues can be deliberately stalled to bring pressure to bear on more than one party. Following review of its "Tentative Proposals", the Committee felt, to be consistent with its previous recommendation the court should be given the power to extend the two year time period.

Recommendations:

1. Where an action has been commenced the liens dependent thereon should expire two years after commencement unless the matter has been set down for trial within the two year period or the court has extended the time period on such conditions as the court deems appropriate.
2. Where a lien has been registered but it has expired, the owner or any mortgagee should be able to apply either on notice or *ex parte* for an order vacating the lien.

6. To what extent should liens be allowed to shelter under an action commenced by another lienholder?

In Saskatchewan, when an action is commenced it gives rights to all lienholders, registered and unregistered. Clause 47(1)(c) directs a plaintiff to name as defendants "all lienholders other than the plaintiff who have registered their claims of lien...or who are known to the plaintiff and that may be entitled to claim a lien". Subsection 46(13) provides that "an action brought by a lienholder shall be taken to be brought on behalf of all lienholders on the property or trust in question". Subsection 37(1) provides that every lien a claim for which is not duly registered ceases to exist unless within the statutory period an action is commenced to realize the claim or in which the claim may be realized. The Committee has already recommended that liens should expire unless registered or notice thereof is given within a prescribed period of time. To require an action to be commenced upon behalf of unregistered lien claimants would defeat the benefits to be derived from this previous recommendation. However, it remains to be considered to what extent registered liens should be able to shelter under an action commenced by another registered lienholder.

One of the benefits that is derived from current mechanics' lien legislation is that a multiplicity of actions is avoided through the principle of sheltering. Instead of each mechanics' lien claimant being required to commence his action, his lien can be preserved if another lien claimant commences action. As noted, in Saskatchewan, this principle is carried to its fullest. Where another lien claimant commences his action, it is not necessary for other lien claimants to commence their own actions. All other lien claims will be preserved by the registration of the certificate of action notwithstanding the fact that the claimant who registered it abandons or settles his action or fails to establish a lien at trial: see Del Frari v. Wright Construction Co., [1960] O.R. 430 (Ont. H.C.); Crawford v. Hesselink (1958), 15 D.L.R. (2d) 294 (Nfld. S.C.); N.S. Sand and Gravel Ltd. v. Kidstone Estates Ltd. (1973), 13 N.S.R. (2d) 431 (N.S.C.C.). Not all models in Canada continue to be as expansive as Saskatchewan's on this point.

In Ontario, subsection 36(4) stipulates that a lien claimant can only shelter as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered. Although this means that plaintiffs need not concern themselves with defendants who register late and bring with them additional defendant payers, it also means that sheltering is primarily limited to lien claimants within the same class.

Subsection 61(2) of the Manitoba Act provides that "any number of lienholders claiming liens on the same land may join in an action, and any action brought by a lienholder or person claiming a lien shall be taken to be brought on behalf of all other lienholders claiming liens on the land". Section 63 limits the application of this provision to registered liens.

The Committee felt that the benefits to be gained from having all issues related to one improvement heard in the same action outweighed the benefit to be gained from allowing one plaintiff certainty as to the dimensions as to parties of his action. On this basis, the Committee preferred the Manitoba approach.

Recommendation:

It should be possible for any registered lien to shelter under an action commenced by another lienholder in relation to the same land as long as the action is commenced before the sheltered lien expires.

7. Under what circumstances should a lien be vacated on payment into court?

At present Saskatchewan's payment into court rules established by section 40 can be summarized as follows:

1. A judge may vacate upon security being posted or funds being paid into court equal to the claim of lien plus

costs upon proof that no other person is entitled to a lien;

2. The security or money takes the place of the land and is subject to the claim of every person who has registered a claim of lien;
3. The claim of the lienholder whose lien has been vacated is a first charge upon the security or money except as to claims of persons claiming through the lienholder for services or materials.

The first and third rules are problematic. The first rule is peculiar to Saskatchewan and was introduced in the 1973 revision. The 1965 legislation provided simply:

> 28(2) Upon application the court or judge may receive security or payment into court in lieu of the amount of the claim and may thereupon vacate the registration of the lien.

In Financial Building Ltd. v. Bird Construction Company Limited et al. (1960), 32 W.W.R. 189 (Sask. D.C.) His Honour Judge Friesen refused an order vacating the registration of a mechanics' lien upon payment into court on the basis that such an order should only be given "in a clear case and where the rights of the lien claimant may not be prejudiced". His Honour accepted the argument that at the time of the application the lien claimant had the full security of the land. If the lien was vacated, and if at the time of trial there were other lien claimants, such claimants would be entitled to share pro rata and thereby reduce the effectiveness of the security of the lienholder whose lien was vacated.

The Thomson Report, to avoid this difficulty, recommended the addition of the third rule above mentioned. By allowing the lienholder a first charge upon the money paid into court he is not prejudiced by the vacating of the lien. However, between the date of the Thomson Report and the 1973 legislation it was decided to adopt the first rule and require the applicant to prove that no other person is entitled to a lien. This would seem to be an impossible task: see Atamanenko v. Terra Cement Service Ltd., [1976] 6 W.W.R. 381 (Sask. D.C.); Total Lighting Sales Ltd. v. Flipside Records & Tapes et al., [1982] 4 W.W.R. 722 (Sask. Q.B.). Although Matador Construction Ltd. v. Mack and Finley, [1980] 1 W.W.R. 57 (Sask. D.C.) held that "proof" in subsection 40(1) does not mean "absolute proof" but proof on the balance of probabilities, the section still remains troublesome. On this point it is instructive to note the comments of the Alberta Institute of Law Research and Reform in its Report No. 30 The Builders' Lien Act: Certain Specific Problems at page 17:

> Section 40(1) of the Saskatchewan Mechanics' Lien Act requires proof that no other person is entitled to remove a lien from the title. We think such a provision would render section 35 virtually useless. In the great majority of cases work will be continuing on the project and there will inevitably be subsisting liens.

The Alberta Institute recommended a reversal of this type of provision and that the legislation should provide that no other lien claimant can claim against the money in court. To avoid the prejudice that would exist to other claimants by this rule the legislation should also provide that the funds paid into court are required to be in addition to holdback funds. This provision would become the functional equivalent of the sections allowing an owner to retain funds over the holdback upon receipt of a written notice of lien or to pay a claimant directly upon notice to the contractor.

The Alberta recommendation was accepted by the Manitoba Law Reform Commission and resulted in subsections 56(1) and (2) of the Manitoba Act:

> 56(1) Any money paid into court or any security given under subsection 55(2) [the subsection under which liens are vacated upon payment into court] stands in place of the land against which the lien was registered and is subject to the claims of
> (a) the persons whose liens have been vacated; and
> (b) every person who

> > (i) both at the time of filing the application under subsection 55(2) and at the time of filing application for payment out under subsection (3), has a subsisting claim for lien, and
> >
> > (ii) has registered a claim for lien prior to the time of filing the application for payment out under subsection (3);
>
> but the persons whose liens have been ordered vacated have a first charge on the money or security to the extent of any amount, including costs, found by the judge to be owing to them.
>
> (2) Money paid into court or security given under subsection 55(2) does not reduce the amount required to be retained by the owner under section 24.

By providing that the money paid into court does not reduce the holdback, the case law which has developed around what is the third rule in Saskatchewan would not be followed in Manitoba. In Bond Structural Steel (1965) Ltd. v. Cloverlawn Investments Ltd., [1973] 3 O.R. 856, the Ontario Supreme Court held that where an owner paid into Court the statutory holdback amount required to discharge all liens, all lien funds should share the fund on a pro rata basis.

Ontario opted for yet another approach. Subsection 44(1) makes it mandatory for a judge on an ex parte application to vacate a lien where the person bringing the application pays into court or posts security in an amount equal to the full amount of the lien plus a fixed amount for costs. Subsection

44(9) provides that the amount paid into court or security posted is subject to the claims of all persons having a lien to the same extent as if the amount was realized by the sale of the land and shall be distributed among all lien claimants according to the usual priority rules. Any funds realized from the sale of the land are required to be pooled with the money in court.

The Committee debated this issue for some time. Both the Manitoba and Ontario approaches meet the expectations of the owner who wishes to keep the project going. The Ontario approach by not recognizing priority among claimants is more consistent with the general priority rules of the Act. The Alberta-Manitoba approach, by insisting that the funds be over and above the holdback funds, does not adversely affect the position of other lien claimants and is more consistent with a scheme which requires the holdback to be deposited in a joint holdback trust account. It is also more advantageous to the lien claimant whose lien has been vacated. On balance, the Committee resolved to recommend the latter approach.

Following the release of the Committee's "Tentative Proposals", the Committee received a number of comments urging that further mechanisms be developed to more easily clear a certificate of title of registered liens. Although it is not possible to accede to the request of those persons who wanted the onus shifted completely to the lien claimant, the Committee felt that there was one further remedy which could be adopted. One of the examples given to the Committee which the Committee felt it could address was where the owner was prepared to pay into court the amount of the holdback, but wished to take no part in the ensuing litigation or wished to clear his title prior to the outcome of the litigation. The Committee felt that if the parties agreed as to the amount of the contract price or the court was satisfied as to the amount of the contract price, the owner or mortgagee, or perhaps even the contractor, could pay 10% of the contract price into court. The amount so paid in would stand in the place of the land. Any action commenced would then be an action in relation to the holdback. Provision could also be made to penalize with costs any claimant who had unreasonably withheld his agreement as to the amount of the contract price.

Recommendations:

1. A judge should be required, upon payment into court or security being posted of an amount equal to the lien claims plus costs, to vacate the liens.
2. The lien claimants whose liens have been vacated should have a first charge on the amount paid in or posted.

3. The court should be required, upon application and upon payment of 10% of the contract price, as agreed by the parties or as determined by the court, to vacate all liens with the amount paid into court standing in the place of the land for the purposes of all actions.
4. The agreement of any lien claimant as to the amount of the holdback should not be unreasonably withheld.

8. Whether the procedure with respect to empowering a registrar to lapse a claim of lien should be amended?

Section 38 of the Saskatchewan Act provides a mechanism whereby the registered owner, a person claiming to be entitled to become the registered owner, or a purchaser under an agreement for sale may require the registrar to notify a lien claimant that his lien will lapse unless a court order is registered within 30 days of the mailing of the notice. The request must be embodied in or accompanied by an affidavit setting out the facts as to the interest held by the person requesting the notice to lapse.

The legislation in force prior to the 1973 Act allowed any person claiming any right, title or interest in and to property in respect of which a claim of lien is registered to request the registrar to send the notice to lapse. There was no requirement for an affidavit. The Thomson Commission Report did not recommend any change in this procedure.

The Committee could not see any good reason for the change. In fact the 1973 legislation has resulted in a cumbersome procedure for the bar and the land titles offices. The Committee felt that any person claiming an interest as a mortgagee or any estate or interest in the land or a solicitor acting on behalf of such a person should be able to request, in a prescribed form, the registrar to send a notice to lapse. The form would also address the issue of partial requests. Although the land titles offices have been careful to ensure that persons requesting a lapse of a lien that affects more than one parcel are conscious of that fact, the legislation does not presently reinforce this practice.

Recommendation:

Any person claiming an interest as a mortgagee or any estate or interest in the land, or his solicitor, should be able to request, in the prescribed form, the notice to lapse.

PART V

PRIORITIES

1. Whether the priority rules between lien claimants and unsecured creditors require revision?

Subsection 25(1) of the Saskatchewan Act provides as follows:

> 25(1) A lien created by this Act has priority over all judgments, executions, attachments, garnishments and receiving orders recovered, issued or made after the lien arises and over all conveyances or mortgages registered after registration of a claim of lien.

This subsection was first added to the Act by The Mechanics' Lien Act, S.S. 1907, c. 21. It has remained unchanged.

A careful reading of this subsection indicates the priority rule to be dependent on when the lien arises and not when the lien is registered. However, Imperial Lumber Yards Ltd. v. Saxton, [1921] 3 W.W.R. 524 (Sask. C.A.) appears to hold that a lien will gain priority over an execution creditor only if the claim for lien is registered and then only from the date of registration of the lien. There is no discussion of the equivalent of subsection 25(1). In Tripp v. Gray (1979), 27 C.B.R. (N.S.) 176 (Sask. D.C.) the court also embarked on a priority resolution between an execution creditor and a lien claimant according to whether the lien claimant had registered within the statutory period, and not whether the lien arose before the execution was issued. The law is perhaps more accurately stated in Silver v. R.R. Seeton Construction Ltd. (1977), 74 D.L.R. (3d) 212 (N.S.C.C.).

The Acts of all the provinces except Alberta and Ontario have the same priority rule as outlined in subsection 25(1) of Saskatchewan. In Alberta, the Act specifically provides that a lien has priority over unsecured creditors if it is registered before such interests were recovered, issued or made.

The Ontario Committee concluded that a section similar to that in the other provinces was intended to provide priority for a lien claimant over all judgments and executions except those executed or recovered upon or before the time when the first lien arose in respect of the improvement and drafted their own section accordingly.

This issue will arise mainly in two fact situations. First, when an unsecured creditor attempts to attach contract moneys in the hands of the owner or other payer. It will also arise, and perhaps more often, when there is a forced sale of the improved land. In the first situation, if the lien claimant were in the trust mode, the fact of and the timing of registration are irrelevant. In the second, the amount which the lien claimants are attempting to recover is the deficiency in the holdback trust account which will almost always be an amount in excess of the value of the property at the time when the first lien arose. There would appear to be an assumption in law that unsecured creditors do not rely on the record. On this basis, the Committee agreed with the Ontario draftsmen that the security of lien claimants as against unsecured creditors should not be dependent on registration. By providing that the priority for all lien claimants is fixed when the first lien arose is consistent with the philosophy of the Act. It also removes the priority which can exist between lien claimants separated by an intervening execution creditor.

Recommendation:

The priority between lien claimants and unsecured creditors should be fixed at the time when the first lien arose.

2. Whether a lien claimant should take priority over a mortgage or conveyance which is registered after the first lien arose?

At the present time subsection 25(1) of the Saskatchewan Act provides that a lien has priority over all mortgages or conveyances registered after registration of a claim of lien. Subsection 26(1) grants a further priority to lien claimants over prior registered mortgages or conveyances to the extent of advances made after a written notice of a lien is given to the person making advances or a claim of lien is registered.

Priority as against this type of creditor is dependent on the registration of a claim of lien. This is best illustrated by United Dominions Investments Limited v. Hospitality Inns Ltd. et al., [1982] 1 W.W.R. 154 (Sask. Q.B.). In this case two lien claimants commenced work on the premises in September of 1979. A mortgagee agreed to loan money shortly thereafter and fully advanced funds in October of 1979. Work on the premises continued. No liens were registered until July, 1980. The court held that subsections 25(1) and 26(1) provide that only "registration of the respective instruments and the date of advances under the mortgage are determinative of the rights of the parties". The liens were in excess of $50,000 and the value of the property could only meet the claims of the mortgagee.

The restructuring of mortgage priorities in Ontario has already been discussed in this report. The Committee has resolved at this time not to follow Ontario in granting priority to a lien claimant over a prior mortgage to the extent of any deficiency in the holdback. However, on the point just raised, the Committee noted that the law in Ontario has always been and continues to be that prior registered mortgages and conveyances only have priority over lien claimants to the extent of the actual value of the premises at the time when the first lien arose or the total of all amounts that were advanced before the first lien arose, whichever is less. A similar provision exists in Nova Scotia. The New Brunswick Act fixes the mortgagee's priority according to the actual value of the premises but gives priority to the mortgagee for all advances made prior to the registration of the lien or receipt by him of notice in writing of the lien, to the extent that the total of such advances does not exceed the actual value of the land at the time an advance is made. No western province has such a priority rule.

In a land titles jurisdiction, a mortgagee must be able to rely on the records of the land titles office.

However, the Committee was concerned with the result dictated by subsections 25(1) and 26(1) in a case like United Dominions Investments, above mentioned. A mortgagee can loan money or take a mortgage for past indebtedness which has nothing to do with the improvement. The property can be of little value at the time the mortgage is taken. If the mortgage is registered before a lien is registered, the mortgage will take priority to the full extent advanced before registration of the lien.

The Committee felt that in the vast majority of cases a mortgagee would not loan money in excess of the value of the property. In fact, the brief from the Canadian Bankers Association asked that provision be made so that a mortgagee could obtain from the mortgagor, and rely on, a statutory declaration that no lien has arisen at the time the mortgagee's mortgage is registered. Thus, it would appear that Saskatchewan's banking practice follows the eastern laws in this regard.

The Committee felt that, under the circumstances outlined above, a prior mortgagee should not take any greater priority over subsequent registered claims of lien than according to the value of the property at the time of the first advance. However, no brief submitted to the Committee suggested or advocated any change in the re-alignment of the priorities between mortgage and lien claimants. Without some indication from the construction industry of the need for the change the Committee was reluctant to recommend a change in this area.

Recommendation:

The priority rules between mortgagees and lien claimants should remain dependent on when the first lien was registered and not when the first lien arose.

3. Whether a lien claimant should take priority over a subsequent mortgagee or conveyance to the full amount of the claim or only to the extent of any deficiency in the holdback?

According to subsections 25(1) and 26(1) the priority between lien claimants and subsequent mortgagees and conveyancers would seem to be absolute. Lien claimants take full priority. Ontario has provided that lien claimants only take priority to the extent of any deficiency. It can be argued that since mortgagees or conveyancers accede to the position of the owner that their financial loss should be no greater than an owner who has failed to maintain a holdback.

However, insofar as an owner is allowed to retain funds on receipt of a written notice of lien or registration of a lien, an owner's liability can increase. Also, subsequent mortgagees and conveyancers and persons making an advance are fully aware of the extent of their risk due to the knowledge of the registered lien.

Recommendation:

Lien claimants should have priority over subsequent mortgagees or conveyancers to the full extent of the lien claims.

4. Whether a solution can be developed to overcome the time lag between receipt of a mechanics' lien claim and registration by a land titles office?

In three recent Saskatchewan cases, First National Mortgage Co. Ltd. v. Realistic Homes Ltd., [1981] 3 W.W.R.1 (Sask. Q.B.); G.W. Harris Drywall Ltd. v. Registrar of Regina Land Registration District (1981), 17 Sask. R. 149 (Sask. Q.B.); Pasqua Paving Ltd. v. Morguard Trust Company et al. (1981) 10 Sask. R. 62 (Sask. D.C.), the issue arose as to when a mechanics' lien is considered to be registered: when it has been assigned a serial number at the time of receipt by a land titles office or when it has been endorsed on the certificate of title. The significance of the issue depends on the currency date of the land titles office. If the office is up-to-date, mortgagees and lien claimants do not need to be as concerned. Each of the decisions held that in accordance with subsection 55(2) of The Land Titles Act an instrument, which includes a mechanics' lien, is not registered until a memorandum has been entered upon the certificate of title. Some persons submitting briefs urged the Committee to codify these decisions in the Act, others felt the decisions should be reversed. Clearly, a reversal of these decisions would seriously affect the liability of the land titles assurance fund. However, the law, as it presently stands, can have a disastrous effect on an individual lien claimant.

The Committee felt that to change the law from that stated in the above cases would have far reaching consequences for the land titles system as a whole. On the other hand the Committee thought that some administrative means should be developed whereby a claim of lien submitted for registration but not yet registered should be placed with the certificate of title which it affects so that any searching party would know of its possible registration.

Recommendation:

An administrative means should be developed by the Department of Justice to ensure that notice of a pending mechanics' lien registration is brought to the attention of any party searching the certificate of title to which the lien relates.

5. Whether the priority position of a labourer should be strengthened and clarified?

The priority rule for labourers is currently set by section 28 of the Saskatchewan Act as follows:

> 28(1) The lien of every labourer whose lien is for wages has, to the extent of thirty days' wages, priority over all other liens and charges derived through the same contractor or subcontractor to the extent of and on the amount required to be retained by section 19 to which the contractor or subcontractor through whom such lien is derived is entitled; and the liens of all such labourers shall rank thereon *pari passu*.
> (2) Every labourer is entitled to enforce a lien in respect of a contract not completely performed.
> (3) Where the contract has not been completed when the lien is claimed by a labourer, the percentage applicable under section 19 shall be calculated on the value of the work done, services rendered and materials furnished by the contractor or subcontractor by whom the labourer is

> employed having regard to the contract price, if any.
> (4) Every device by an owner, contractor or subcontractor intended to defeat the priority given by this Act to the lien of a labourer for his wages is in respect of the labourer void.
>
> "Labourer", "wages" and "work" are defined as:
> 2(1)(e) "labourer" means a person who is employed for wages to perform labour of any kind, whether employed under a contract of service or not;
> (2)(1)(o) "wages" means money earned by a labourer for work done whether by time or as piece work or otherwise;
> 2(1)(p) "work" includes the doing of work and the performance of services upon or in respect of an improvement and also includes the breaking of any land or the clearing of timber or scrub.

The first issue raised by these provisions is the extent of the priority for wage earners. This issue is linked to the interaction of The Mechanics' Lien Act and The Labour Standards Act. Under The Labour Standards Act, there is no monetary limit on the priority given to wage earners over other creditors claiming against an employer, and apart from certain types of named security interests in section 56 of The Labour Standards Act that Act purports to give priority to wage earners over all such creditors. Furthermore subsection 72(3) of The Labour Standards Act provides that any provision in any Act that is less favourable to an employee than The Labour Standards Act is superseded by that Act. This has led to three reported cases in which wage claims were given priority over mechanics' lien claimants: Comfort Mechanical Ltd. v. Nor Sask Drywall Ltd. (1980), 3 Sask. R. 176 (Sask. D.C.); Re Kenroc Building Materials (1978) Ltd. and City of Regina (1981), 130 D.L.R. (3d) 189 (Sask. Q.B.) affirmed (1982), 138 D.L.R. (3d) 189 (Sask. C.A.) and Northern Lights School Division #113 v. Government of Saskatchewan et al., [1981] 6 W.W.R. 503 (Sask. Q.B.). In this latter case there was an agreement with respect to wage claims.

In its "Tentative Proposals" the Committee expressed its concern about the outcome of these cases particularly the result in the first case. In the Comfort Mechanical case the labourer, for whom the Department of Labour claimed contract funds and to whom the court granted priority, had not improved the land and was an employee of the owner. This means that mechanics' lien subcontractors can pursue a court action only to discover that funds have been claimed by the Department of Labour on behalf of a wage earner who was not entitled to be paid out of those contract or subcontract funds. For some subcontractors it is impossible to say that their economic strength or position is any greater than a worker. This would not appear to meet the purposes for which a Mechanics' Lien Act is developed, i.e., to encourage the provision of credit in the construction industry and to protect the claims of contractors, subcontractors, materialmen and labourers who provide such credit. It was the opinion of the Committee that only the wage claims arising out of an improvement should be enforced as against funds payable with respect to that improvement and that, in the interests of balancing all claims on a construction site, there should be a limit on the extent of the priority given to wage earners. Thus, if wages are due to a labourer on a construction site the means to enforce that claim should be, if construction funds are claimed, through The Mechanics' Lien Act. Similarly, the Committee felt that other wage earners employed by contractors, etc., on other sites or in non-construction jobs should not be entitled to claim on construction funds. In this regard the Committee approved the decision of Smily, J. of the Ontario Supreme Court in Re Arthur J. Lennox Contractors Limited (No. 1) (1959), 38 C.B.R. 97 who held that claims from other jobs should not be allowed by the trustee in Bankruptcy.

Following release of its first Report, the Committee again reviewed the issues of whether non-lien claimant wage earners should be able to claim on the lien fund and whether the same procedural standards should apply to lien claimant wage earners as other lien claimants. On the first point, the Committee affirmed its policy decision that only labourers who have improved a site should be able to assert priority over other lien claimants. On the second point, the Committee was concerned that by overruling *The Labour Standards Act* as it relates to construction sites, and, therefore the *Comfort Mechanical* case, labourers may be placed in a more difficult position in proving their claims and asserting their priority. If *The Labour Standards Act* applies to mechanics' lien matters, the lien claimant who is a wage earner does not need to register a lien and does not need to prove that the wages are claimed for hours of work actually provided on a particular job site. He need only prove he was employed by the owner, contractor or subcontractor and that he is owed wages. The Committee felt that some of this flexibility should be retained for labourers by not requiring a labourer to register a claim of lien in order to assert his claim or to prove that the wages owed were earned only in relation to the land upon which his lien is claimed. A labourer to whom wages were owed should be allowed to claim priority if it is proven that the wage earner did provide labour in relation to that site and that he was employed by a subcontractor, contractor or owner who improved the land. This would not affect the release of the holdback. If an owner searches at the land titles office, he may release the holdback following the expiration of the statutory period if no lien is registered. If a lien is registered and an action is commenced wage earners may participate in the action. If no lien is registered, no action may be commenced in the absence of a cause of action in relation to the trust.

Having made this decision the Committee thought that a number of changes should be made to make it easier for a labourer to enforce his claim under the Act.

The first point which appears from section 28 and the definition of wages is whether or not "wages" includes such monetary items as holiday pay, overtime pay, contributions to pension plans, unemployment insurance, etc. Clearly, these items are just as much part of the employment package and accordingly the Committee resolved to include such items in the definition of wages.

The second area where the position of labourers should be strengthened is with respect to the number of days' wages entitled to priority. Both Ontario and Manitoba have increased this to 40 days' wages. The Committee agreed with this change. For any amount in excess of 40 days' wages, the lien claimant should be able to share pro rata with the other lien claimants and should be entitled to any amount actually coming to his employer as a result of any distribution under the Act.

The third limitation imposed by section 28 on the labourers' priority is that the priority is limited to the holdback. Ontario removed this limitation. Manitoba did not. The Committee felt there was no justification for this limitation. The purpose of the priority rule is to recognize to some extent the weaker bargaining position of labourers. If more funds than the holdback are available for distribution, the labourer should be entitled to assert his priority.

In its "Tentative Proposals" the Committee discussed whether the Department of Labour should have standing in mechanics' lien matters. The Committee felt that it was important for the Department to be able to move quickly when presented with a claim enforceable under the Act. In this regard the Committee recommended that the current practice of the Department should be confirmed by providing specifically that Labour Standards inspectors be able to act as agents in registering and enforcing mechanics' lien claims. Following release of its "Tentative Proposals" the Department of Labour asked that this issue not be addressed in the context of The Mechanics' Lien Act. The Department preferred to consider the inclusion of such a provision in its own legislation. If the changes recommended by the Committee with respect to a wage earner not being required to register a claim of lien are accepted this is no longer an issue.

Recommendations:

1. The definition of wages should be expanded to include all monetary supplementary benefits whether provided for by

statute, contract or collective bargaining.

2. The number of days' wages entitled to priority should be expanded to forty days' wages.
3. The amount of the priority should not be limited to the holdback.
4. The Mechanics' Lien Act and not The Labour Standards Act should govern the enforcement of wage claims against funds payable under a contract or subcontract. Only labourers improving the land which is the subject matter of the lien and not other employees should be entitled to claim against such funds. A labourer should be entitled to priority without filing a claim of lien if he can prove that he did work on the improvement and he was employed by an owner, contractor or subcontractor who has improved the land.

6. Whether priorities among other lien claimants should be legislated?

Ontario has added the following sections to codify the position of lien claimants:

> 81 All persons having a lien who have supplied services or materials to the same payer comprise a class, and a person who has supplied services or materials to more than one payer is a member of every class to the extent to which his lien relates to that class.

> 82(1) Except where it is otherwise provided by this Act,
>
> (a) no person having a lien is entitled to any priority over another member of the same class;
>
> (b) all amounts available to satisfy the liens in respect of an improvement shall be distributed rateably among the members of each class according to their respective rights; and
>
> (c) the lien of every member of a class has priority over the lien of the payer of that class.
>
> (2) Any conveyance or mortgage in respect of the premises to any person entitled to a lien on the premises, in payment of or as security for that claim, whether given before or after that lien arises, is void against all other persons entitled to a lien on the premises.

At the present time Saskatchewan explains the distribution among lien claimants, other than wage earners, by subsection 26(3):

> 26(3) Except as otherwise provided by this Act, no person entitled to a lien on any land or on any money is entitled to any priority or preference over lienholders or claimants of the same class entitled to a lien on the land or money and lienholders or claimants of the same class rank _pari passu_ for their several amounts and the proceeds of any sale shall be divided among them _pro rata_ according to their several classes and rights.

The Committee felt that the Ontario expansion would be extremely useful in explaining the structure of the Act and ensuring the proper distribution of funds. However, Ontario goes on to provide that in an insolvency, trust funds are to be distributed according to sections 81 and 82, first among those who have proved a lien. Insofar as this may require registration of a claim of lien and a certificate of action, the Committee did not agree with this addition. The Committee felt that some guidance should be given to the court when it is distributing trust funds by providing that sections 81 and 82 should apply, but that the fact of registration should be irrelevant. This is in keeping with the theory of the Act which treats the two methods of enforcement, the trust and the lien, separate, although issues relating to either method of enforcement can be tried together.

Recommendations:

1. The rules with respect to distribution among lien claimants should be codified.
2. The court should be directed to distribute trust funds to parties proving claims according to the priorities among lien claimants generally notwithstanding that such claimants may not have registered claims of lien or certificates of action.

PART VI

ADDITIONAL REMEDIES

1. Whether persons entitled to receive a benefit under a labour and material payment bond should be able to sue on the bond?

There are three types of bonds commonly in use in the construction industry: the bid bond, the performance bond and the labour and material payment bond. The bid bond, which is usually 10% of the tendering price, is security for the tender. It is a guarantee that the person submitting the tender will enter into an award. If the tendering party fails to enter into the contract, the owner has the right to approach the second bidder and can use the bond to offset the difference between the two bid amounts. The performance bond guarantees that the project will be completed at the bid price, but does not guarantee any payment of debts existing at the time of default. It is the labour and material payment bond that is intended to pay the debts extant at default. This latter bond guarantees payment to subcontractors, labourers and materialmen who have contracted with the person who holds the bond. Some labour and material payment bonds, for example on federal government construction projects, cover more than one tier in the construction pyramid.

Bonds, by their nature, create a tripartite relationship. A person known as a "surety" guarantees that a person named in the bond, known as the "principal", will perform certain acts for another person known as the "obligee" of the bond. The "obligee" is the beneficiary of the bond. In a labour and material payment bond, the surety guarantees that the beneficiary will be paid. However, since the beneficiaries of the bond, labourers, materialmen, etc., are not parties to the bond in a contractual sense, they cannot sue the bonding company on the bond, and must rely on the "principal" to pursue the claim on their behalf. If the "surety" refuses the claim the "principal" must sue the "surety" which can present certain legal difficulties. The British Columbia government has long since recognized this problem and provided for its solution in subsection 2(39) of the Laws Declaratory Act, S.B.C. 1964, c.27:

> A claimant under a labour and material bond has a cause of action against the surety named in the bond in the event that the principal named in the bond defaults in his obligations thereunder, and may commence an action against the surety on his own behalf and on behalf of other claimants to recover the amount of the claim or claims.

A similar provision exists in the new Ontario legislation. The Committee felt that a section allowing beneficiaries to sue on labour and material payment bonds would be useful. It should also be possible for a lien claimant to demand and receive a copy of any applicable labour and material payment bond.

Recommendations:

1. A beneficiary under a labour and material payment bond should be able to commence action against the surety.
2. A lien claimant should be entitled to demand from owners, contractors or subcontractors a copy of any labour and material payment bond.

2. Whether the right to information provisions should be expanded?

Saskatchewan's present right to information provisions have some major differences from other provinces. Saskatchewan and British Columbia are the only provinces which allow the owner to demand that the contractor, subcontractor or lien claimant provide the terms of any contract and a statement of account respecting each contract. This right in the owner is enforceable by withholding payment from the contractor or instructing the contractor or another subcontractor to withhold payment from the person refusing to provide information. The assumption must be made in other provinces that the owner has the contractual leverage to acquire such information and does not require statutory assistance. In addition, only Manitoba and Saskatchewan empower the court to compel an owner, mortgagee, vendor, contractor or subcontractor to produce contracts, documents, books or records or make copies thereof.

It is noted, in Saskatchewan's section 44, that the information available to a lien claimant from an owner, mortgagee, unpaid vendor, contractor or subcontractor is "the terms of the agreement...and a statement of the amount due and unpaid thereunder". The information which an owner may demand may include the terms of, or a copy of, any contract, and a written statement of the amounts paid and owing verified by statutory declaration. The time period for providing information is within ten days after the demand has been served.

The Ontario Committee made a number of recommendations for change in this area. Prior to the Construction Lien Act, it was possible for a lien claimant to demand a copy of the contract between the owner and the contractor. The Ontario Committee felt that this provision was seldom observed because it was unduly onerous and seriously infringed on the confidentiality of contracts in the industry. On the basis that right to information sections should require the disclosure of only that information which facilitates the enforcement of rights under the Act, Ontario recommended the provision of only certain specific categories of information available only to a mortgagee, lien claimant or trust beneficiary. In relation to the contract, only the names of the parties on the contract, the contract price and the state of accounts would be available. For subcontracts, the contract price cannot be obtained. From a mortgagee or unpaid vendor, it is possible to obtain a statement showing the amount advanced, the date of advances and any arrears in payment including any arrears of interest. The maximum time period within which information is to be provided is 21 days after the request for information is made.

In addition to the changes already mentioned in Ontario's right to information provisions, any person may give a person who has verified a claim for lien, every other person named in the claim for lien as having an interest in the premises, the contractor and the payer of the lien claimant, seven days' notice of his intention to cross-examine on the claim of lien, irrespective of whether an action has been commenced and without order. There can only be one examination but the persons served may participate in the examination. It was the view of the Ontario Committee that a right to cross-examine on an affidavit in support of a lien would encourage the enforcement of only honest claims and would provide more information about the claim.

Manitoba confers rights of information on persons entitled to a lien from owners, contractors, subcontractors, mortgagees or unpaid vendors, or the agent of any such person. Reasonable costs must be paid before the information is produced. Copies of contracts or agreements can form part of the request for information. From the owner or contractor, a lien claimant is entitled to demand the name and address of the bank, trust company or credit union in which a holdback trust account has been opened, the account number and a statement as to the particulars of credits to and payments from the holdback account including the dates of the credits and payments, accrued interest and the present balance.

The Committee preferred the present Saskatchewan provisions which confined the request to "the terms of" contracts or agreements but which give the owner the right to demand certain kinds of information. However, the Committee felt that it would be useful to allow a mortgagee to request information in the same way as a lien claimant. The Committee also felt it would be useful to make it clear that trust beneficiaries could demand information and to allow the cross-examination on registered claims of lien without court order. Information relating to the holdback trust account is consistent with earlier decisions requiring the establishment of such an account. Following release of its first proposals the Committee was persuaded that an owner should only be able to demand information from a subcontractor when a claim of lien has been registered or written notice of lien has been given to him.

Recommendations:

1. Owners should be able to continue to demand information from subcontractors only when a claim of lien has been registered or written notice of lien has been given.
2. It should continue to be possible to compel, with a court order, the production of agreements, contracts and subcontracts related to the project.
3. Mortgagees and trust beneficiaries should be added to the list of persons who can demand information.
4. It should be possible to cross-examine a lien claimant on his claim for lien without court order.
5. Lien claimants should be able to require information relating to the joint holdback trust account.

3. Whether greater flexibility should be provided to the court in the appointment of receivers and trustees?

Since 1973, Saskatchewan courts have had the power to appoint receivers of rents and profits and trustees to manage, mortgage, lease or sell the improved property. These powers, set by section 50, could only be exercised at any time after the issue of the originating notice and could not be exercised by one individual. The court had to appoint both a receiver and a trustee to effect full control of the improvement. The Committee felt that these powers should be exercisable by the court irrespective of whether an action was commenced and should be capable of being conferred on one person according to the discretion of the court.

Recommendation:

The court should be able to appoint a trustee with all of the powers of a receiver-manager irrespective of whether an action has been commenced.

PART VII

JURISDICTION AND PROCEDURE

1. Whether the jurisdiction for the enforcement of the lien and trust provisions should remain with the Court of Queen's Bench?

Since the amalgamation of the District Court and the Court of Queen's Bench in Saskatchewan in 1981, the jurisdiction for the enforcement of the lien and the trust provisions under The Mechanics' Lien Act has been in the Court of Queen's Bench. Prior to 1973, the District Court held exclusive jurisdiction under The Mechanics' Lien Act. In 1973, the Act allowed a judge of the Court of Queen's Bench to order, under certain circumstances, that the action be transferred to the Court of Queen's Bench. Otherwise, the jurisdiction for mechanics' liens remained in the District Court.

The Committee received two proposals to change the jurisdiction from the Court of Queen's Bench. Those proposals suggested that lien claims of $3,000 or less should be heard and determined by the Provincial Court. Those proposals were based upon the premise that the Provincial Court could deal with claims under $3,000 more expeditiously and that the costs in Provincial Court would be less than in Queen's Bench. The Committee considered this proposal but felt that more problems would be created by splitting the jurisdiction than solutions would be achieved. One major problem is that the Provincial Court does not have jurisdiction to deal with the title to land. In addition, the Committee felt that many disputes would arise about the monetary limit of the Provincial Court. For example, would the $3,000 limit apply to each individual lien or would it be the aggregate of the liens? Would the $3,000 limit apply to the original contract price or simply to the balance owing at the time? Finally, the Committee felt that it would be an artificial distinction to allow a $3,000 claim to proceed in Provincial Court and to require a $3,100 claim to proceed in Queen's Bench.

The Committee also noted that there would be two distinct and different procedures if claims under $3,000 were tried in the Provincial Court and claims over $3,000 were tried in the Court of Queen's Bench.

The Committee did feel that a lien claimant whose claim is within the monetary limit of The Small Claims Enforcement Act should be allowed to be represented by an agent who is not a barrister and solicitor. The Ontario Act has that provision (Section 69(5)).

The Committee also noted that there is no division of jurisdiction in any of the other provinces.

The Committee also considered a suggestion that a special tribunal be created to handle lien claims. Again, the Committee noted that no other province had established a special tribunal to deal with lien claims. As well, the Committee considered the costs which would be associated with a special tribunal compared to the existing court structure. Such a tribunal would be required to sit in seventeen judicial centres in Saskatchewan in order to provide the same degree of service currently provided by the Court of Queen's Bench. The Committee felt that the existing court structure was preferable to the uncertainty of the new tribunal.

The Committee also gave consideration to including arbitration provisions in the Act. During its review, the Committee perceived a need to prevent minor problems in construction from hindering job completion. This view was echoed by one of the associates with Hanscomb Consultants and by HUDAC. The Committee noted that in The Mechanics' Lien Ordinance of 1898, section 12 provided that disputes as to the validity or amount of an unpaid account could be determined either by action or by arbitration. Section 14 provided for a three-man arbitration board with the payer on the contract and the lien claimant each nominating an arbitrator and the two arbitrators nominating a third. This provision did not appear in the consolidation of 1907. Initially the Committee felt that the standard form construction contracts contain an arbitration clause and that this clause coupled with The Arbitration Act would render any further provisions in The Mechanics' Lien Act superfluous. However, the Committee noted that these provisions did not exist in all contracts and were clauses requiring formal proceedings, usually before a three man arbitration board. The Committee envisioned the use of a single arbitrator who could be either a lawyer, engineer, architect or chartered accountant of the parties choosing and who could don a hard hat and make his decision at the construction site, if necessary and appropriate. The function of the arbitrator would be to resolve the dispute to enable the improvement to be completed as expeditiously as possible. He would be required to give written reasons but his award would be required within 7 days of the hearing, or such further times as may be agreed by all parties. His decision would be binding upon the parties with questions of law referable to the Court of Queen's Bench. The Committee felt that such a procedure would be worth inserting to determine whether such a procedure was workable, and perhaps worthy of expansion.

Recommendations:

1. The Court of Queen's Bench should continue to have jurisdiction over the lien and the trust provisions of the Act.
2. A lien claimant whose claim is within the monetary limit of the Provincial Court under The Small Claims Enforcement Act should be allowed to be represented by an agent who is not a barrister and solicitor.
3. The Act should contain summary arbitration procedures.

2. Whether a lien claimant should be required to apply for leave to enforce his lien against a homestead?

Under section 45 of the Saskatchewan Act, no action to enforce a lien against a homestead shall be commenced except by leave of a judge granted upon application. The only exception under section 45 is if a lien claimant is served with a notice to lapse his lien. Otherwise, a lien claimant must apply *ex parte* to a judge for an appointment to hear the application for leave to commence the action. After the judge appoints a hearing date, notice of that date must be served at least fifteen days in advance on all persons directed by the judge to be served with notice. The lien claimant must then appear before the judge on the hearing date and the judge may grant the lien claimant leave to commence an action to enforce his lien, or the judge may refuse to grant the application, or the judge may adjourn the hearing for any period up to eight months. The decision of the judge may be appealed to the Court of Appeal.

The above procedure is virtually identical to the procedure for applying for leave to commence a foreclosure action.

The Committee was perplexed by the dilemma created by section 45. On the one hand, section 45 provides additional protection against the potential loss of an individual's homestead. On the other hand, section 45 creates a cumbersome and expensive procedure for the lien claimant who happens to have a claim of lien against the homestead. On balance, the Committee felt that the delay and expense to the lien claimant was an unnecessary burden in light of the recommendations of the Committee regarding lien claims which affect property registered in joint names. As well, the time limits recommended by the Committee provide a new form of protection to the owner.

The Committee also noted that no other province has a provision similar to section 45.

Recommendation:

There should be no special application required for leave to enforce a lien against a homestead and section 45 should be deleted.

3. Whether the procedure to commence an action to enforce a lien claim or to enforce the trust provisions should be similar to the procedure for commencing any other action in the Court of Queen's Bench?

Under section 46 of the Saskatchewan Mechanics' Lien Act, proceedings to enforce a lien are commenced by the issue of an originating notice. Use of an originating notice began in 1973. Prior to that time, proceedings to enforce a lien were commenced by statement of claim and writ of summons. The change to an originating notice was intended to eliminate the various procedures between commencement of an action and the trial by bringing the matter before a judge on the return date of the originating notice. In practice that intention has not been realized.

By the very nature of a construction project, proceedings to enforce a lien involve several parties with different interests. The issues can rarely be identified without a detailed examination of each party's position. The use of an originating notice did not provide for that detailed examination of the facts. As a result, the practice has been for the court to direct an issue and grant the right to the parties to conduct examinations for discovery and to examine documents. The only exception to this procedure is if all the parties consent to an order. Only then will the court make an order without directing an issue.

Under the present Saskatchewan Act, confusion also exists about the proper procedure for commencing proceedings to enforce the trust provisions. The Act is not clear whether proceedings to enforce the trust provisions are to be commenced by an originating notice or by a statement of claim. It is also not clear whether an action to enforce a lien and an action to enforce the trust provisions can be combined in one action.

The Committee felt that the procedure for enforcing liens and for enforcing the trust provisions should be similar to the commencement of other proceedings in the Court of Queen's Bench. The ordinary procedure for actions in the

Queen's Bench seems preferable to the existing procedure for an originating notice. With the use of a statement of claim, statements of defence, counterclaims and cross-claims, the Committee felt that the issues would be more clearly defined and the parties could bring the matter to trial as soon as they had completed all of the steps which they were advised to take.

The Committee also noted that the procedure to enforce liens in each of the other provinces followed the ordinary procedure of the courts in that province with some slight variations.

The Committee considered the utility of continuing those provisions of the Act permitting summary determination of disputes as contained in section 41 of the current Act. The Committee was unable to determine any cases in which these provisions had been utilized. It was the Committee's view that these provisions, relating as they do to the determination of issues which are primarily contractual in nature were out of context with the scheme of the legislation. Further, the Committee felt that such issues could not realistically be determined on summary consideration and distinct from issues arising related to the lien claims. Such issues should more properly be determined as part of a lien action.

Recommendations:

1. Proceedings to enforce a lien should be commenced by statement of claim and should follow the ordinary procedure of an action in Queen's Bench except as varied by new legislation.
2. An action to enforce the trust provisions should also be commenced by statement of claim.
3. A trust claim and a lien claim may be joined in the same action.

PART VIII

GENERAL CHANGES

1. Whether The Mechanics' Lien Act should impose record keeping requirements on contractors and subcontractors?

Some persons providing comments to the Committee indicated that the reason why The Mechanics' Lien Act was difficult to apply in certain circumstances was due to the lack of good record keeping practices in the construction industry. Court actions or settlements are delayed because claims submitted cannot be substantiated except through lengthy verbal testimony. The Committee was aware that Manitoba has imposed stringent record keeping requirements on contractors and subcontractors enforceable by prosecution, (see Manitoba Act, section 10). These provisions were as a result of a recommendation made by the Manitoba Law Reform Commission in its Report at pages 21 and 22:

> In our view, some minimum accounting standard, along the lines of the minimum required to be kept by employers by The Employment Standards Act (C.C.S.M. cap. E110) would still need to be established. With the exception of those requirements in The Builders and Workers Act dealing with the pay list for workers there are at the present time no such minimum requirements set out by The Mechanics' Liens Act in respect of the building industry. In order to educate builders as to the minimum

> requirements in this regard to facilitate enforcement of the legislation, we therefore recommend that minimum accounting requirements be spelled out in The Mechanics' Liens Act or alternatively, in the Regulations to the statute.

This issue was addressed by the Thomson Report. Apparently, Manitoba had, at that time, a provision in its County Court Rules similar to section 31 of The Saskatchewan Evidence Act providing for the admissibility of records made in the ordinary course of business. Case law, in Manitoba, namely Fargey v. Holyk, [1929] 2 W.W.R. 204 (Man. C.A.) and Finkelstein Estate v. Olympic Knit & Sportswear Ltd. (1962), 39 W.W.R. 55 (Man. C.A.), indicated that such records, received in evidence, would be prima facie proof of the plaintiff's claim. The Thomson Report recommended the inclusion of a special provision to this effect. It is assumed that the recommendation was not accepted on the basis that it would be a duplication of section 31 of The Saskatchewan Evidence Act.

The Committee felt that the inclusion of record keeping requirements, although an imposition in the first instance, would assist in the settlement and proof of unpaid claims. As to the means of enforcement, the Committee considered the possibility of providing either that book entries showing unpaid accounts, submitted either by the payer or payee, would be proof, in the absence of evidence to the contrary, of the facts alleged or that the absence of such records would sound in costs against the lien claimant. At this point, the Committee has decided to recommend criminal enforcement similar to the Manitoba legislation.

Recommendation:

Contractors and subcontractors should be required to keep records showing the state of all accounts which requirement should be enforceable by criminal sanctions.

2. Whether it should be possible to prove delivery of materials where a contractor or subcontractor signs an acknowledgement?

The problem raised by HUDAC faced by material suppliers in proving delivery of materials to the land which is the subject of an improvement has already been discussed, to some extent, in the portion of this Report dealing with the general lien. Section 14 of the present Act provides that "material shall be deemed to be furnished to be used within the meaning of this Act when it is delivered". Until the case of Nelson Lumber Company Ltd. v. Integrated Building Corporation Ltd. et al., [1973] 3 W.W.R. 716 (S.C.C.), the law could have been that subsection 14(1) and comparable sections in other provinces required delivery by the material supplier. The Nelson Lumber case held that there is no restriction on who may deliver the materials. The materials may be taken to another site or picked up by a contractor or subcontractor. However, the materials must still arrive at the site for a lien to arise and there has to be some means of proving this fact. The easiest means, at the present time, for a materialman to prove arrival at the site is for him to deliver it himself. This is not always practical and can be a time consuming process calling for verbal testimony to prove the facts.

The British Columbia Law Reform Commission recommended the inclusion of a section that if the person to whom materials were supplied, or his agent, signs an acknowledgement of receipt of the materials stating that they are received for inclusion in an improvement at a named address, the material will, in the absence of evidence to the contrary, be deemed to have been delivered to the land described by the address. The Committee thought that this was a recommendation it should adopt.

Recommendation:

A signed acknowledgement from the person to whom the materials were supplied or his agent should be prima facie proof of the delivery of materials to the construction site.

3. Whether the name of the Act should be changed?

The Committee received several briefs advocating that the name of the Act be changed to more accurately reflect, in today's terminology, the substance of the Act. Two suggested names were The Construction Lien Act and The Builders' Lien Act. The first name has its origin in Ontario. The second, with minor changes in pluralization and punctuation, is the name given to the same legislation in British Columbia, Alberta and Manitoba. The Mechanics' Lien Act continues to be the name used in the Maritime provinces and Newfoundland. None of the names covers all of the situations contemplated by the Act like improvements involving drilling, grading or ditching. However, the name, The Mechanics' Lien Act, is often misleading to those persons whom it was designed to protect. Accordingly, on this basis and in the interests of Western uniformity, the Committee resolved to change the name to The Builders' Lien Act.

Recommendation:

The name of the Act should be changed to The Builders' Lien Act.

APPENDIX "A"

LEGISLATIVE HISTORY IN SASKATCHEWAN

The Mechanics' Lien Ordinance, Consolidated Ordinances of the North-West Territories 1898, c.59.
  amendments: (1) 1903, c. 18
    (2) 1906, c. 26
  repealed: The Mechanics' Lien Act, S.S. 1907, c. 21

The Mechanics' Lien Act, S.S. 1907, c. 21

The Mechanics' Lien Act, R.S.S. 1909, c. 150
  amendments: (1) 1912-13, c. 46, s. 38
    (2) 1913, c. 38
    (3) 1915, c. 43, s. 27
    (4) 1917, c. 34, s. 21

The Mechanics' Lien Act, R.S.S. 1920, c. 206
  amendments: (1) 1920, c. 72
    (2) 1924, c. 48
    (3) 1924-25, c. 49
    (4) 1925-26, c. 56
    (5) 1928-29, c. 72

The Mechanics' Lien Act, R.S.S. 1930, c. 247
  amendments: (1) 1933, c. 74
    (2) 1939, c. 89

The Mechanics' Lien Act, R.S.S. 1940, c. 296
  amendments: (1) 1943, c. 63
    (2) 1951, c. 90

The Mechanics' Lien Act, R.S.S. 1953, c. 249
  amendments: (1) 1957, c. 70
    (2) 1958, c. 82

The Mechanics' Lien Act, R.S.S. 1965, c. 277
  amendments: 1971, c. 30
  repealed: The Mechanics' Lien Act, 1973, S.S. 1973, c. 62, s. 62

The Mechanics' Lien Act, 1973, S.S. 1973, c. 62
  amendments: (1) 1973, c. 106, s. 5
    (2) 1973-74, c. 61

The Mechanics' Lien Act, R.S.S. 1978, c. M-7
  amendments: (1) 1979, c. 38
    (2) 1979-80, c. 92, s. 58
    (3) 1980-81, c. 76, s. 12
    (4) 1982-83, c. 16, s. 37
    (5) 1983, c. 11, s. 51

APPENDIX "B"

BRIEFS RECEIVED BEFORE FIRST REPORT

Rees, Sonnenschein & Bailey
Barristers & Solicitors
Lincoln's Inn
313 - 20th Street, East
Saskatoon, Saskatchewan
S7K 0A9

Richard F.D. Schoefield
Associate
Hanscomb Consultants Inc.
Suite 5, 2425 - 13th Avenue
Regina, Saskatchewan
S4P 0W1

D.K. Winterton
Owner/Manager
United Carpet
129 - 15th Street, East,
Prince Albert, Saskatchewan
S6V 1G1

J.M. Somers
Association of Consulting
Engineers of Sask.
2255 - 13th Avenue,
Regina, Saskatchewan.
S4P 0V6

M.P. Smith, Chairman,
The Canadian Bankers' Assoc.
Box 2008,
Saskatoon, Saskatchewan
S7K 1K6

E.W. Clark, Secretary
B O M A International (Regina)
Box 3220
Regina, Saskatchewan
S4P 3N8

M.D. Kearney,
Executive Director
Western Retail Lumbermen's Assoc.
601 - 228 Notre Dame Avenue
Winnipeg, Manitoba
R3B 1N7

Sylvan D. Chyz
Chyz Appraisals
443 - 2nd Avenue, North
Saskatoon, Saskatchewan
S7K 2C1

P. C. Hensman, General Manager
Crippen Acres
115 - 2001 Cornwall Street,
Regina, Saskatchewan
S4P 3X9

Eldon Anderson, Manager
Public Affairs/Corporate
Secretary
Credit Union Central
2055 Albert Street,
Regina, Saskatchewan
S4P 3G8

D.R. McGuigan, Chairman
Saskatchewan Association of
Architects
101 - 701 Broadway Avenue
Saskatoon, Saskatchewan
S7N 1B3

W.M. Wheatley, Director
Saskatchewan Real Estate Assoc. &
Regina Real Estate Assoc. Inc.
1854 McIntyre Street
Regina, Saskatchewan
S4P 2P9

Katherine D. Wellman
General Counsel
Saskatchewan Power Corporation
2025 Victoria Avenue
Regina, Saskatchewan
S4P 0S1

Keith E. Barton
Vice-President & General Counsel
Potash Corporation of Sask.
410 - 22nd Street, East
Saskatoon, Saskatchewan
S7K 5T7

L. Wilkinson
Executive Director,
Saskatchewan Association of Rural Municipalities
2075 Hamilton Street,
Regina, Saskatchewan
S4P 2E1

K.A. McKinlay
Executive Director
Saskatchewan Council Housing & Urban Development Assoc. of Canada
857 Arcola Avenue
Regina, Saskatchewan
S4N 0S9

Audrey S. Brent
Senior Crown Prosecutor
Saskatchewan Justice
15th Floor
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7

Robert F. Smith
Project Co-ordinator
Engineering Department
Prince Albert Pulp Company Ltd.
Box 3001
Prince Albert, Saskatchewan
S6V 5T5

T.J. Ennis
Executive Vice-President
Saskatchewan Construction Assoc.
Construction House
1939 Elphinstone Street
Regina, Saskatchewan.
S4P 3C6

Peter E. Grady
Saskatchewan Labour
1914 Hamilton Street
Regina, Saskatchewan
S4P 4V4

J.A. McLean
Executive Director
Saskatchewan Workers' Compensation Board
1840 Lorne Street
Regina, Saskatchewan
S4P 2L8

R. Bing-Wo, P. Eng.
General Manager & Registrar
The Association of Professional Engineers of Saskatchewan
2255 - 13th Avenue
Regina, Saskatchewan
S4P 0V6

Gerald M. Devlin, Q.C.
Executive Vice-President
Canadian Life & Health Insurance Assoc. Inc.
20 Queen Street, West,
Suite 2500
Toronto, Ontario
M5H 3S2

General Contractors' Association of Saskatchewan
Mr. J. Maier
President
c/o Cana Construction Ltd.
Box 1486
Saskatoon, Saskatchewan
S4K 3P7

Rhonda Stevenson, President
Consumers' Association of Canada
(Saskatchewan)
#700, 2125 - 11th Avenue,
Regina, Saskatchewan
S4P 3X3

APPENDIX "C"

BRIEFS RECEIVED FOLLOWING FIRST REPORT

T. Douglas Kent
Vice President and
Senior Counsel
Canadian Life and Health
Insurance Association Inc.
20 Queen Street West
Suite 2500
Toronto, Ontario
M5H 3S2

Larry G. Anderson
Crown Solicitor
Civil Law Branch
Department of Justice
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7

A.J. Rollie, Registrar
Moose Jaw Land Titles Office
76 Fairford Street, West
Moose Jaw, Saskatchewan
S6H 4P1

E. Fuchs, Registrar
Battleford Land Titles Office
61 - 22nd Street, West
Battleford, Saskatchewan
S0M 0E0

Audrey S. Brent
Senior Crown Prosecutor
Special Prosecutions Unit
Department of Justice
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7

Canadian Bankers' Association
Box 2008
Saskatoon, Saskatchewan
S7K 1K6

P.C. Hensman, General Manager
Crippen Acres
#115, 2001 Cornwall Street
Regina, Saskatchewan
S4P 3X9

K.A. McKinlay,
Executive Director
Saskatchewan Council
Housing & Urban Development
Association of Canada
857 Arcola Avenue
Regina, Saskatchewan
S4N 0S9

Katherine D. Wellman
General Counsel
Saskatchewan Power Corporation
2025 Victoria Avenue
Regina, Saskatchewan
S4P 0S1

The Hon. Mr. Justice G. E. Noble
Court of Queen's Bench,
Saskatchewan
520 Spadina Crescent, East
Saskatoon, Saskatchewan
S7K 3G7

Eldon Anderson, Manager of Public
Affairs/Corporate Secretary
Credit Union Central
2055 Albert Street
Regina, Saskatchewan
S4P 3G8

T.J. Ennis
Executive Vice-President
Saskatchewan Construction Assoc.
Construction House
1939 Elphinstone Street
Regina, Saskatchewan
S4P 3C6

Robert F. Smith
Project Co-ordinator
Prince Albert Pulp Co. Ltd.
Box 3001
Prince Albert, Saskatchewan
S6V 5T5

General Contractors Association
of Saskatchewan
c/o T.J. Ennis, Executive Director
Construction House
1939 Elphinstone Street
Regina, Saskatchewan
S4P 3C6

Rhonda Stevenson, President
Consumers' Association of Canada
(Saskatchewan)
#700, 2125 - 11th Avenue
Regina, Saskatchewan
S4P 3X3

Carl D. MacPhedran, Chairman
Association of Consulting
Engineers of Saskatchewan
2255 - 13th Avenue
Regina, Saskatchewan
S4P 0V6

D.R. McGuigan, MRAIC
Chairman
Saskatchewan Association of
Architects
#101, 701 Broadway Avenue
Saskatoon, Saskatchewan
S7N 1B3

Construction Specifications Canada
Regina Chapter
825 MacKay Street
Regina, Saskatchewan
Att: D.R. McGuigan

S.D. Matthews
President & General Manager
Subterranean (Western) Ltd.
Box 1397
Regina, Saskatchewan
S4P 3C2

W.K. Naylor
Clark Roofing (Sask.) Ltd.
Box 1546
Regina, Saskatchewan
S4P 3C4

Gary Miller, President
Building Owners & Managers Assoc.
Box 3720
Regina, Saskatchewan
S4P 3N8

J.A. McLean, Executive Director
Saskatchewan Workers' Compensation
Board
1840 Lorne Street
Regina, Saskatchewan
S4P 2L8

Peter E. Grady
Saskatchewan Labour
1914 Hamilton Street
Regina, Saskatchewan
S4P 4V4

Paul Ruttimann, Manager
Western Aluminum Products Group
331 - 105th Street
Saskatoon, Saskatchewan
S7N 1Z4

Les LaRocque, C.E.T.
Secretary/Treasurer
Interwest Mechanical Ltd.
1729 Broder Street
Regina, Saskatchewan
S4N 5P1

Ron McRae, Office Manager
Botting Mechanical Ltd.
320 Jessop Avenue
Saskatoon, Saskatchewan
S7N 1Y6

C.A. Rivest, President and
General Manager
Interprovincial Concrete Ltd.
235 - 103rd Street
Saskatoon, Saskatchewan
S7N 1Y8

F.J. Sutherland
Drywall & Plastering
(Saskatoon) Ltd.
2413 Thayer Avenue
Saskatoon, Saskatchewan
S7L 5Y1

Merlis Belsher
Weldon's Concrete Products Ltd.
1920 - 11th Street, West
Saskatoon, Saskatchewan
S7M 1J2

John Krahn
Gypsum Drywall (Western) Ltd.
2213 Hanselman Court
Saskatoon, Saskatchewan
S7L 6A8

Thomas R. Ough,
General Manager
Box 1884
Saskatoon, Saskatchewan
S7K 3S2

R.E. O'Shea, Estimator
Bridge City Mechanical Ltd.
372 Birch Crescent
Saskatoon, Saskatchewan
S7M 2M7

Ted Kenworthy,
Branch Administrator
General Paint
28 - 33rd Street, East
Saskatoon, Saskatchewan
S7K 0R9

Hal Foster, President
M.H. Foster Electrical
Contractors Ltd.
522 - 43rd Street, East
Saskatoon, Saskatchewan
S7K 0V6

J. Obrodovich
Bridge City Painting
& Decorating
14 Malta Place
Saskatoon, Saskatchewan
S7L 3Z6

R. Marquardt, President
Marquardt Mechanical Ltd.
2729 - 24th Avenue
Regina, Saskatchewan
S4S 1J6

Rudy R. Balzer
Balzer's Installations Ltd.
#2, 1408 Ottawa Street
Regina, Saskatchewan
S4P 3R8

M. Bourassa, President
General Contractors Association
Saskatchewan
1939 Elphinstone Street
Regina, Saskatchewan
S4T 3N3

R.H. Hopkinson
Saskatoon Branch Manager
Darr Distributors Limited
#9, 814 - 56th Street
Saskatoon, Saskatchewan
S7K 5Y8

R. Bing-Wo, P. Eng.
General Manager and Registrar
The Association of Professional
Engineers of Saskatchewan
2255 - 13th Avenue
Regina, Saskatchewan
S4P 0V6

APPENDIX "D"

THE BUILDERS' LIEN ACT

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
SHORT TITLE		
1 This Act may be cited as The Builders' Lien Act.	1 The Committee has recommended a new name for the Act to more accurately reflect the construction industry's understanding of the purpose of the legislation.	1 This Act may be cited as The Mechanics' Lien Act.
PART I INTERPRETATION		
2(1) In this Act: (a) "contract" means the contract between the owner and the contractor, and includes any amendment to that contract;	2(1)(a) This definition is added to identify that where the Act refers to "contract" it means the "prime" or "head" contract or contract directly with the owner.	New
(b) "contractor" means a person contracting with or employed directly by the owner or his agent to provide services or materials to an improvement, but does not include a labourer;	2(1)(b) There is little change in this definition. Note that there is no longer any reference to "work". As will be seen, the definitions of "work" and "services" have been combined.	2(1)(b) "contractor" means a person contracting with or employed directly by the owner or his agent to do work upon, to render services for or to furnish materials for, an improvement, but does not include a labourer;
(c) "court" means Her Majesty's Court of Queen's Bench for Saskatchewan and "judge" means a judge of that court whether sitting in court or in chambers;	2(1)(c) No change	2(1)(c) "court" means Her Majesty's Court of Queen's Bench for Saskatchewan and "judge" means a judge of that court whether sitting in court or in chambers;
(d) "Crown" means: (i) Her Majesty in right of Saskatchewan; (ii) an agent of Her Majesty in right of Saskatchewan, including The Workers' Compensation Board; (iii) a board, local authority or	2(1)(d) Reference is made specifically to municipal corporations. Municipal corporations were previously part of the definition of Crown in the common law meaning of "local authority". Local authorities under The Northern	2(1)(c.1) "Crown", except where used in section 35, means: (i) Her Majesty in right of Saskatchewan; (ii) an agent of Her Majesty in right of Saskatchewan, including The Workers' Compensation Board;

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
municipal corporation that is created by or under: (A) The Conservation and Development Act; (B) The Drainage Act; (C) The Education Act; (D) The Irrigation Districts Act; (E) The Lloydminster Municipal Amalgamation Act, 1930; (F) The Northern Municipalities Act; (G) The Rural Municipality Act; (H) The Rural Telephone Act; (I) The South Saskatchewan Hospital Centre Act; (J) The Union Hospital Act; (K) The University Hospital Act; (L) The University of Regina Act; (M) The University of Saskatchewan Act; (N) The Urban Municipality Act; (O) The Water Corporation Act; (P) The Water Users Act; (Q) The Watershed Associations Act;	Municipalities Act are added to this list. The Municipal Public Works Act does not create a local authority but merely empowers local authorities to do certain things and has been deleted.	(iii) a local authority that is created by or under: (A) The Conservation and Development Act; (B) The Drainage Act; (C) The Education Act; (D) The Irrigation Districts Act; (E) The Lloydminster Municipal Amalgamation Act, 1930; (F) Repealed. 1983, c.77, s.45. (G) The Municipal Public Works Act; (H) The Private Ditches Act; (I) The Rural Municipality Act; (J) The Rural Telephone Act; (K) The South Saskatchewan Hospital Centre Act; (L) The Union Hospital Act; (M) Repealed. 1983, c.11, s.51. (N) The University Hospital Act; (O) The University of Regina Act; (P) The University of Saskatchewan Act; (Q) The Urban Municipality Act; (R) The Water Users Act; (S) The Watershed Associations Act; and that is empowered by any Act to carry out any public work;
(e) "condominium unit" means a unit or additional unit in a condominium plan or a replacement plan intended to be used primarily for the residence of not more than one family but does not include a unit or additional unit that is used for	2(1)(e) This definition is added to facilitate the special rules developed for the residential construction industry dealing with the holdback trust account and the statutory period.	New

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
a purpose other than a residence except where it is used for that other purpose by a person who resides in the unit or additional unit and that other purpose is subsidiary to the use of the unit or additional unit as a residence;		
(f) "estate or interest in land" includes a statutory right given or reserved to the Crown to enter any lands or premises for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;	2(1)(f) No change.	2(1)(c.2) "estate or interest in land" includes a statutory right given or reserved to the Crown to enter any lands or premises for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises;
(g) "four-plex" means a structure intended to be used primarily for the residences of not more than four families but does not include a structure that is used for a purpose other than a residence except where it is used for that other purpose by a person who resides in the structure and that other purpose is subsidiary to the use of the structure as a residence;	2(1)(g) This definition is added for the same purpose as the definition of "condominium unit".	New
(h) "holdback" means the amount equal to 10% of the greater of: (a) the value of the services or materials as they are actually provided under a contract or subcontract; or (b) the amount of any payment made on account of a contract or subcontract price;	2(1)(h) "Holdback" is defined to clarify that the references in this Act to the "holdback" are to the holdback for the purposes of this Act and not a deficiency holdback.	New

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
required to be withheld from payment by Part IV;		
(i) "house" means a structure intended to be used primarily for the residences of not more than two families but does not include a structure that is used for a purpose other than a residence except where it is used for that other purpose by a person who resides in the structure and that other purpose is subsidiary to the use of the structure as a residence;	2(1)(i) Again, this definition is added for the same purpose as the definition of "condominium unit". It is intended that each of these definitions will ensure that the special rules for the residential construction industry will apply even where one of the householders conducts a business from his home.	New
(j) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes: (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, upon or under land; (ii) the demolition or removal of any building, structure or works or part thereof; and "improved" has a corresponding meaning;	2(1)(j) The demolition or removal of a building is added to the definition of improvement to allow such activities to create a lien on land.	2(1)(d) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to be or become part of the land and includes clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, upon or under land;
(k) "labourer" means a person who is employed for wages to perform labour of any kind, whether employed under a contract of	2(1)(k) No change.	2(1)(e) "labourer" means a person who is employed for wages to perform labour of any kind, whether employed under a contract

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
service or not;		of service or not;
(l) "materials" means every kind of movable property that becomes or is intended to become, part of the improvement, or that is used to facilitate directly the making of the improvement;	2(1)(l) Further detail is provided.	2(1)(g) "material" or "materials" includes every kind of movable property;
(m) "owner" includes a person having an estate or interest in land, other than an encumbrance, at whose request, express or implied, and: (i) upon whose credit; (ii) on whose behalf; (iii) with whose privity and consent; or (iv) for whose direct benefit; an improvement is made to the land;	2(1)(m) No change in meaning.	2(1)(h) "owner" includes a person having an estate or interest in land, other than an encumbrance, at whose request, express or implied, and: (i) upon whose credit; (ii) on whose behalf; (iii) with whose privity and consent; or (iv) for whose direct benefit; work or service is done or performed upon, or material is placed or furnished for an improvement to or on, the land and includes all persons claiming under him whose rights are acquired after the commencement of the work or service or the furnishing of the material in respect of which a lien is claimed;
(n) "payer" means the owner, contractor or subcontractor who is liable to pay for the materials or services provided to an improvement under a contract or subcontract;	2(1)(n) The term "payer" replaces the phrase "the person primarily liable" which is found throughout The Mechanics' Lien Act. The use of "payer" allows the meaning of the sections where it is used to be more easily understood.	New

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
(o) "payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract;	2(1)(o) Again, this definition is added to clarify the meaning of sections where it is used.	New
(p) "person" includes a body corporate and the Crown;	2(1)(p) Partnerships and associations are eliminated from the definition of "person". These entities are not legally allowed to hold an interest under the land titles system. Where a contract for an improvement is made with an association or partnership, the individuals who make up the entity remain entitled to claim a lien.	2(1)(i) "person" includes a body corporate, a partnership, an association and the Crown;
(q) "prescribed" means prescribed in the regulations;	2(1)(q) Forms and other procedural matters will be prescribed by regulation.	New
(r) "registered" means: (i) in the case of a claim of lien mentioned in section 42 and in the case of a mortgage, conveyance or other agreement mentioned in Part VI, registered within the meaning of The Land Titles Act and includes filed, when no certificate of title is issued for the land affected; (ii) in the case of a claim of lien mentioned in section 43, filed with the Records Officer, Department of Energy and Mines; (iii) in the case of a claim of lien mentioned in section 44, given to the Crown;	2(1)(r) As far as possible liens in relation to Crown property, mineral interests held from the Crown and other land will be treated in the same manner. This definition allows the word "registered" to be used in relation to each type of lien and highlights the three places of registration for a lien.	2(1)(j) "registered" means registered under The Land Titles Act and includes filed when no certificate of title is issued for the land affected by the lien;

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
and "registering" and "registration" have corresponding meanings;		
(s) "registrar" means the registrar of land titles for the land registration district within which the land in respect of which the lien is claimed is situated;	2(1)(s) No change.	2(1)(k) "registrar" means the registrar of land titles for the land registration district within which the land in respect of which the lien is claimed is situated;
(t) "services" means any work done or service performed upon or in respect of an improvement and includes the rental of equipment and the wages of any operator provided with the equipment;	2(1)(t) The existing definitions of "work" and "services" are combined into the definition of "services".	2(1)(l) "services" includes the use of equipment leased by a person to an owner, contractor or subcontractor in connection with an improvement, to the extent of the fair and reasonable value of the use of the equipment, and includes the wages of any operator provided with the equipment; 2(1)(p) "work" includes the doing of work and the performance of services upon or in respect of an improvement and also includes the breaking of any land or the clearing of timber or scrub.
(u) "services or materials" includes both services and materials;	2(1)(u) This definition is inserted out of an abundance of caution to ensure that a contract for services and materials can be the subject matter of a lien. It finds its origin in the Ontario Construction Lien Act.	New
(v) "subcontract" means any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to	2(1)(v) Like the definition of "contract" the term "subcontract" is intended to ensure that contracts not with the owner have a special	New

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
the provision of services or materials and includes any amendment to that agreement;	position in the Act.	
(w) "subcontractor" means a person, not contracting with or employed directly by an owner or his agent, but who provides services or materials to an improvement under an agreement with the contractor or under him with another subcontractor, but does not include a labourer;	2(1)(w) No change in meaning.	2(1)(n) "subcontractor" means a person not contracting with or employed directly by an owner or his agent for the doing of any work, rendering of any services or the furnishing of any material but contracting with or employed by a contractor or under him by another subcontractor, but does not include a labourer;
(x) "wages" means all money earned including overtime and statutory holiday pay, by a labourer for work done whether by time or as piece work or otherwise, and includes all monetary supplementary benefits, whether provided for by statute, contract or collective bargaining agreement;	2(1)(x) It is intended that "wages" be as expansive as possible to include all possible amounts earned by a labourer.	2(1)(o) "wages" means money earned by a labourer for work done whether by time or as piece work or otherwise;
(y) "written notice of a lien" means any written notice given by a lien claimant that: (a) provides the name and address of the lien claimant; (b) identifies his payer and identifies the land; (c) states the amount that he has not been paid and is owed to him by his payer; and (d) claims a lien.	2(1)(y) This definition is inserted to clarify what type of notice will either stop the hand of the paymaster, move him to retain the amount claimed, pay the amount claimed directly to the complainant, or take steps to have the notice withdrawn through arbitration or some court action including cross-examination of the claimant without an action being commenced.	New
(2) For the purposes of this Act, materials are provided to an	2(2) There is no change as to the meaning of when materials are	14(1) Material shall be deemed to be furnished to be used within the meaning of this Act when it is delivered or placed either on the

Committee's Draft Proposal for a Builders' Lien Act	Explanation of Draft	Existing Mechanics' Lien Provisions
improvement when they are: (a) placed on the land on which the improvement is being made; (b) placed upon land designated by the owner or his agent that is in the immediate vicinity of the land, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or (c) in any event, incorporated into or used in making or facilitating directly the making of the improvement.	provided to an improvement. It is made clear that placing of the materials upon land designated does not, alone, make the land subject to a lien.	land on which it is to be used or on such other land or place in the immediate vicinity thereof as is designated by the owner or his agent or by the contractor or subcontractor. (2) Notwithstanding that any material to be used in or for an improvement may not have been delivered in strict accordance with subsection (1), where the material is incorporated in the improvement the person furnishing the material has a lien therefor as set out in section 12.
(3) Where a person to whom materials are provided, or his agent, signs an acknowledgement of receipt of the materials stating that the materials are received for inclusion in an improvement at a named address, the materials will prima facie be deemed to have been delivered to the land described by the address.	2(3) This definitional rule is intended to overcome the requirement that materials must be delivered, in most cases, to claim a lien. If the owner or his agent signs an acknowledgement as provided the materials will be prima facie deemed to have been delivered to the land described.	New
(4) A contractor or subcontractor to whom materials are provided who designates land under clause (2)(b) or signs an acknowledgement of receipt under subsection (3) is deemed to be the owner's agent for that purpose, unless the person providing the materials has actual notice to the contrary.	2(4) This rule is added to provide further security to the materialman.	New

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3(1) For the purposes of this Act, a contract is substantially performed: (a) when the improvement to be made under that contract or a substantial part of the improvement is ready for use or is being used for the purposes intended; and (b) when the improvement to be made under the contract is capable of completion or, where there is a known defect, correction, at a cost of not more than: (i) 3% of the first $500,000 of the contract price; (ii) 2% of the next $500,000 of the contract price; and (iii) 1% of the balance of the contract price.	3(1) The rules for determining when a contract is substantially performed are changed in the following ways: (a) the contract is declared to be substantially performed upon the happening of the events in the section; (b) the determination of the value of the amount of the work to be done is dependent upon correction of known defects only; (c) the amount of the contract price from which the percentage of the cost of completion is taken is increased to $500,000.	2(2) For the purposes of this Act, a contract shall be considered to be substantially performed: (a) when the improvement or a substantial part thereof is ready for use or is being used for the purpose intended; and (b) when the work to be done under the contract is capable of completion or correction at a cost of not more than: (i) three per cent of the first $250,000 of the contract price; (ii) two per cent of the next $250,000 of the contract price; and (iii) one per cent of the balance of the contract price.
(2) For the purposes of this Act, where the improvement or a substantial part of the improvement is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be provided and required to complete the improvement shall be deducted from the contract price in determining substantial performance.	3(2) This subsection allows a completed part of an improvement to be severed from the improvement as a whole where the completed part can be used and the remainder cannot be completed expeditiously. The purpose of this severance is to allow the completed part to be declared substantially performed to facilitate the early release of the holdback. The subsection has been expanded to allow the owner and the contractor to agree not to complete the improvement expeditiously.	2(3) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purpose intended and where the improvement cannot be completed expeditiously for reasons beyond the control of the contractor, the value of the work to be completed shall be deducted from the contract price in determining substantial performance. (4) Repealed. 1979, c.38, s.3. 1973, c.62, s.2; 1973, c.106, s.5; 1979, c.38, s.3; 1979-80, c.92, s.58; 1983, c.11, s.51; 1983, c.77, s.45.
(3) For the purposes of this Act, a contract or a subcontract shall be	3(3) A definition of completion, distinct from the concept of	New

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deemed to be completed when the price of completion, correction of a known defect or last supply of services or materials is not more than the lesser of: (a) 1% of the contract price; and (b) $1,000.	substantial performance is required: (a) to allow early release of the holdback on a subcontract completed before substantial performance of the main contract; (b) to determine when a contract is complete to calculate when the final holdback may be released; and (c) to determine the day from which the statutory period for the registration of liens will commence. The source of the definition is the Ontario Construction Lien Act.	
4(1) Except as otherwise provided, the Crown is bound by this Act. (2) This Act does not apply where services or material are provided: (a) in connection with a contract entered into under or pursuant to The Highways and Transporation Act; (b) in connection with the construction or improvement of a street or highway owned by the Crown. (3) Notwithstanding subsection (2), this Act applies where services or materials are provided in connection with the construction or improvement of a bridge owned by the Crown other than a bridge constructed or improved under or pursuant to The Highways and Transportation Act.	4(1), 4(2), 4(3) The Act continues to bind the Crown except with respect to contracts governed by The Highways and Transportation Act and highway or street construction. The construction of bridges not under The Highways and Transportation Act continues to be governed by The Builders' Lien Act.	2.1(1) All of the provisions of this Act, except section 61, bind the Crown except in respect of work done, services rendered or materials furnished: (a) in connection with a contract entered into under or pursuant to The Highways Act; (b) in connection with the construction or improvement of a street or highway owned by the Crown; or (c) under a contract entered into prior to the day this section comes into force or under any subcontract entered into, directly or indirectly, under such a contract. (2) Notwithstanding clauses (1)(a) and (b), all of the provisions of this Act, except section 61, bind the Crown in respect of work done, services rendered or materials furnished in connection with the construction or improvement of a bridge owned by the Crown other than a bridge constructed or improved under or pursuant to The Highways Act. 1979, c.38, s.4.

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PART II TRUST PROVISIONS		
5(1) All amounts received by an owner, other than the Crown, that are to be used in the financing of an improvement, including the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.	5(1) The trust provisions are changed to reflect the need for privity of contract for the trust relationship to exist. The trust, in the owner's hands, is imposed to ensure that construction funds reach the contractor. Subsection 5(1) creates a trust on borrowed monies upon receipt by the owner.	3(1) All sums received by a builder, contractor or subcontractor on account of the contract price constitute a trust fund in his hands for the benefit of the owner, builder, contractor, subcontractor, The Workers' Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rendered work or services on the contract site, and the builder, contractor or subcontractor, as the case may be, is the trustee of all sums so received by him and he shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied material on the contract or work or services on the contract site and all subcontractors are paid for work done, services rendered or materials supplied on the contract and The Workers' Compensation Board is paid any assessment with respect thereto.
	The list of beneficiaries no longer includes The Workers' Compensation Board. No priority was given to the Board by its inclusion as a beneficiary. The removal of the Board from the list does not change the obligation to pay any premium. It merely clarifies that trust funds are intended only for the benefit of those who improve the land.	3(4) All sums received by an owner, other than the Crown, which are to be used in the financing, including the purchase price of the land and the payment of prior encumbrances, of a building, structure or work, constitute, subject to the payment

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		of the purchase price of the land and prior encumbrances, a trust fund in the hands of the owner for the benefit of the persons mentioned in subsection (1), and, until the claims of all such persons have been paid, the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.
(2) Where the owner provides his own capital or where the owner is the Crown, and where amounts become payable under a contract to a contractor, an amount that is in the owner's hands or received by him for payment under the contract at any time thereafter constitutes a trust fund for the benefit of the contractor.	5(2) This subsection imposes a trust on monies in the owner's hands or received by him for payment as soon as an amount is payable under the contract. This is the mirror situation to that described in subsection 5(1) except that in subsection 5(2) the source of the funds is not through financing. Subsection 5(2) applies equally to the Crown.	3(3) Where a sum becomes payable under a contract to a contractor by an owner on the certificate of a person authorized under the contract to make such a certificate, an amount equal to the sum so certified that is in the owner's hands or received by him at any time thereafter shall, until paid to the contractor, constitute a trust fund in the owner's hands for the benefit of the contractor, subcontractor, The Workers' Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rendered work or services on the contract site, and the owner shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust until all workmen and all persons who have supplied materials on the contract or who have rendered work or services on the contract site and all

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		contractors and subcontractors are paid for work done or materials supplied on the contract and The Workers' Compensation Board is paid any assessment with respect thereto.
(3) Where the owner's interest in an improvement is sold by the owner, an amount equal to: (a) the value of the consideration received by the owner as a result of the sale; less: (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any encumbrances which are entitled to priority under this Act; constitutes a trust fund for the benefit of the contractor.	5(3) This section is intended to create a trust on monies received by an owner from the sale of the improvement and to still allow the owner to discharge any mortgage which would have priority under the Act.	New
(4) The owner is the trustee of the trust fund created by subsections (1) to (3), and he shall not appropriate or convert any part thereof to his own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to him by the owner.	5(4) The trust is imposed upon the owner to ensure that the contractor receives the money due to him.	New
6(1) All amounts: (a) owing to a contractor, whether or not due or payable; or (b) received by a contractor; on account of the contract price of an improvement constitute a trust fund for the benefit of:	6(1) As in section 5, section 6 constitutes a trust in favour of those persons contracting directly with the contractor. It also eliminates the argument raised with respect to the present law that money owing to the contractor but not yet	

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(c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and (d) labourers who have been employed by the contractor for the purpose of performing the contract.	due and payable as a result of a contract dispute was not to be considered trust money. The Committee proposes that if the money has been earned with respect to the improvement but not yet paid to the contractor a trust is imposed for the benefit of those persons contracting with the contractor.	
(2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by him.	6(2) The contractor as trustee is directed not to appropriate any part of the trust fund to his own use until the beneficiaries of the trust are paid.	
7(1) All amounts: (a) owing to a subcontractor, whether or not due or payable; or (b) received by a subcontractor; on account of the subcontract price of an improvement constitute a trust fund for the benefit of: (c) subcontractors who have subcontracted with the subcontractor and other persons who have provided materials or services to the subcontractor for the purpose of performing the subcontract; and (d) labourers who have been employed by the subcontractor for the purpose of performing the	7(1) and 7(2) The comments with respect to the trust in the hands of the contractor are applicable here.	

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subcontract. (2) The subcontractor is trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by him.		
8 Where an improvement is wholly or partly destroyed or damaged by fire or otherwise, any amount received or receivable by reason of insurance on the property by a trustee mentioned in section 5, 6, or 7, or a prior mortgagee, takes the place of the improvement so destroyed or damaged to the extent of the value of the improvement as part of the contract price and constitutes, after satisfying the claim of any mortgagee, which is otherwise entitled to priority, a trust fund for the benefit of the beneficiaries mentioned in sections 5, 6, or 7, as the case may be, and the trustee shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until the beneficiaries for whose benefit the trust is created are paid all amounts related to the improvement owed to them by the trustee.	8 Section 8 follows existing subsection 4(1) closely. The Committee did not include subsection 4(2) on the basis that where a public work is destroyed and insurance money received is more similar to subsection 5(3) where funds are earmarked for a particular project. Although the Committee could accept that funds received through financing by the Crown are not received for a particular project and therefore should not be the subject of a trust, the Committee felt that where property is sold or destroyed, and insurance received, a trust should be constituted regardless whether the land is publicly or privately owned.	4(1) Where an improvement is wholly or partly destroyed or damaged by fire or otherwise, any money received or receivable by reason of insurance thereon by the owner, prior mortgagee or chargee, contractor or subcontractor takes the place of the property so destroyed or damaged to the extent of the value thereof as part of the contract price and is, after satisfying the claims, if any, of mortgagees or chargees under prior registered instruments, a trust fund in the hands of the owner, contractor or subcontractor, as the case may be, and section 3 applies to the money. (2) Where the improvement mentioned in subsection (1) is a public work, that subsection does not apply to any moneys received or receivable by reason of insurance thereon by the owner, prior mortgagee or chargee. 1973, c.62, s.4; 1979, c.38, s.6.

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9 Where any part of the consideration of a contract between an owner and a contractor or a subcontract between a contractor and a subcontractor does not consist of money, the value of the part of the consideration that does not consist of money shall be deemed to be money owing from the owner to the contractor or from the contractor to the subcontractor, as the case may be, for the benefit of the persons for whom the trust is constituted as mentioned in subsections 5(4), 6(2) and 7(2), respectively.	9 No change.	3(5) Where any part of the consideration of a contract between an owner and a contractor does not consist of money, the value of the part of the consideration that does not consist of money shall be deemed to be money owing to the contractor from the owner and the owner shall be considered to hold that amount of money in trust for the benefit of any subcontractor, The Workers' Compensation Board, workmen, and persons who have supplied materials on account of the contract or who have rendered work or services on the contract site until the claims of all such persons have been paid.
10 Subject to the requirement to maintain a holdback as required by Part IV, a trustee who pays in whole or in part for the services or materials to an improvement or pays a beneficiary pursuant to the contract or subcontract out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by him without being in breach of the trust.	10 No change.	3(2) Notwithstanding subsection (1), where a builder, contractor or subcontractor has out of his own funds paid in whole or in part for any materials supplied on account of the contract or for any services rendered or has paid any workman who has performed any work or any subcontractor who has placed or furnished any materials in respect of the contract, the retention by the builder, contractor or subcontractor of a sum equal to the sum so paid by him shall be considered not be an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

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11 Subject to the requirement to maintain a holdback as required by Part IV, where a trustee pays in whole or in part for the services or materials to an improvement or pays a beneficiary pursuant to the contract or subcontract, as the case may be, out of money that is loaned to him, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and this application of trust money does not constitute a breach of the trust.	11 No change.	3(6) Notwithstanding anything in this section, where money is lent to a person upon whom a trust is imposed by this section and is used by him to pay in whole or in part for any work done, services rendered or materials placed or furnished trust moneys may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and any sum so applied shall be considered not to be an appropriation or conversion to the trustee's own use or to any use not authorized by the trust. 1973, c.62, s.3; 1979, c.38, s.5.
12 Subject to the requirement to maintain a holdback as required by Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between himself and the person he is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, that are related to the improvement.	12 This section is inserted to codify the case law. A trustee may set off debts arising out of the holdback over and above the holdback.	New
13 Subject to the requirement to maintain a holdback as required by Part IV, every payment by a trustee to a person he is liable to pay for services or materials provided to the improvement discharges the trust of the trustee making the payment and his obligations and liability as	13 This section again emphasizes that the purpose of the trust provisions is to ensure an orderly flow of funds through the construction pyramid. The funds are not to be diverted to any purpose inconsistent with the trust. However, if the trustee pays a beneficiary he is discharged.	New

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trustee to all beneficiaries of the trust to the extent of the payment made by him.		
14 In addition to any other priority which a beneficiary of a trust constituted by this Part may have at law, a beneficiary shall have priority over all general or special assignments, security interests, judgments, attachments, garnishments and receiving orders of the contract or subcontract price or any portion of the contract or subcontract price whenever received, granted, issued or made.	14 There is no change in the priority rules. The words "in addition to any other priority which a beneficiary...may have at law" are added to ensure that the priority rule, which is declaratory of the priority which exists at common law between trust beneficiaries and creditors claiming on the trust, is not limiting in its scope. Subsection 5(2) of the existing Act is not included. It was perceived that any direction as to the distribution of the trust would overlook the contractual obligations imposed upon the trustee with respect to the distribution of trust funds.	5(1) Every person for whose benefit a trust is created by section 3 or 4 has, subject to the provisions of that section, a lien upon the trust fund for the value of the work done, services rendered or materials supplied or furnished by that person and the lien takes priority over all general or special assignments and judgments, attachments, garnishments and receiving orders of the contract price or any portion of the price whenever received, used or made and of any right of set off. (2) Subject to subsection 3(2) and to section 4, the builder, contractor or subcontractor, as the case may be, shall distribute the money from time to time comprising the trust among the persons for whose benefit the trust is created, according to the liabilities of the builder, contractor or subcontractor to such persons, on a pro rata basis.
15(1) Where a corporation is constituted a trustee by this Part, in addition to the persons who are otherwise liable in an action for breach of trust: (a) every director or officer of the corporation; and	15(1) This section expands the ambit of those persons responsible for ensuring the construction trust is properly discharged to include those persons who effectively control a corporation. It also makes it impossible to evade the obligations	New

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(b) any person, including an employee or agent of the corporation who has effective control of the corporation or its relevant activities; who assents to, or acquiesces in, conduct that he knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.	of this Part through the creation of a shell company.	
(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.	15(2) In determining whether a person has effective control, the court has the power to look at the substance of the transaction.	New
(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable. (4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution on indemnity as the court considers	15(3) and 15(4) The balance of section 15 provides for apportionment and contribution where there is more than one party in breach of trust similar to provisions currently found in The Contributory Negligence Act.	New

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appropriate in the circumstances.		
16 Where a dispute arises with respect to the claim of a person for whose benefit a trust is constituted by this Part, or with respect to the administration of the trust fund by the trustee, the person with respect to whose claim the dispute has arisen, or any person for whose benefit the trust fund is created by this Act or the trustee, may apply to a judge for directions to settle the dispute and the judge may give any direction or make any order appropriate in the circumstances.	16 This section restates the provisions of existing section 7.	7 Where a dispute arises with respect to the claim of a person for whose benefit a trust is constituted by section 3 or 4, or with respect to the administration of the trust fund by the trustee, the person with respect to whose claim the dispute has arisen, or any person for whose benefit the trust fund is created by this Act or the trustee, may apply to a judge to settle the dispute and section 41 applies mutatis mutandis. 1973, c.62, s.7.
17(1) Every person upon whom a trust is imposed by this Part who knowingly appropriates or converts any moneys constituting a trust under this Part to or for his own use or to or for any use inconsistent with the trust is guilty of an offence and liable, on summary conviction, to a fine of not more than $50,000, to imprisonment for a term of not more than two years or to both such fine and imprisonment and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this section is, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to a similar penalty. (2) The time limit for laying an information for the purposes of	17(1) and 17(2) Although section 296 of the Criminal Code creates an indictable offence, punishable by up to 14 years imprisonment, to convert trust funds with an intent to defraud, the Committee felt that a provincial summary conviction offence has a role to play in the case of less serious transgressions. However, the present section which requires, in the absence of a contrary provision, a prosecution to be commenced within six months of the offence, made it difficult to gain the benefit of the section. By extending the limitation period to two years, the Committee felt that more prosecutions could be instituted under this section. The Committee did not feel that the	6(1) A person upon whom a trust is imposed by section 3 or 4 who knowingly appropriates or converts any part of the trust money referred to in section 3 or 4 to his own use or to any use not authorized by the trust is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or both fine and imprisonment; and every director or officer of a corporation who knowingly assents to or acquiesces in any such offence by the corporation is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than two years or both fine and imprisonment whether or not the corporation has been prosecuted or convicted of the offence.

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subsection (1), is two years from the time when the offence occurred.	Attorney General should be called upon to give his consent to a prosecution authorized by section 17. The increase in the penalty is indicative of the seriousness of the infraction.	(2) No prosecution shall be instituted under subsection (1) without the consent in writing of the Attorney General. 1973, c.62, s.6; 1973-74, c.61, s.2.
18 Upon the expiry of one year after the contract is completed or abandoned, the trustee is discharged from his obligations as trustee imposed pursuant to this Part, subject to the ability to commence and maintain a prosecution or maintain an action commenced to enforce the trust, and no action to assert a claim to trust moneys shall be commenced upon the expiration of the time mentioned.	18 One of the criticisms directed to the existing trust provisions was the shortness of the limitation period which also did not extinguish the cause of action. Although no action could be commenced after the expiry of the period provided, it was unclear what the obligations of the trustee were after the time provided for the commencement of the action had expired. The Committee felt that a limitation period that extinguished the trust should be legislated but that the present time period was too short and should run from the completion or abandonment of the contract for a period of one year.	8(1) An action to assert a claim to trust moneys mentioned in the preceding sections may be commenced by originating notice and sections 46 to 50, subsections 51(1) and (2) and sections 53 and 55 apply mutatis mutandis in respect of the action. (2) Subject to subsection (3) but otherwise notwithstanding anything in this Act, no action to assert a claim to trust moneys mentioned in the preceding sections shall be commenced except: (a) in the case of a claim by a contractor or subcontractor in cases not provided by clauses (b), (c) and (d) within one hundred and twenty days after the completion or abandonment of the contract or subcontract; (b) in the case of a claim for materials within 120 days after the supplying or furnishing of the last materials; (c) in the case of a claim for wages within 120 days after the last work was done for which the claim is made; or (d) in the case of a claim for services within 120 days after the last work was done for which the claim is made.

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		(3) A judge may, upon being satisfied by affidavit or oral evidence that it is fit and proper to do so, upon application by a party for whose benefit a trust is constituted under this Act by notice of motion served upon the trustee and owner before the expiry of the period specified in subsection (2) by order extend the time for commencing an action with respect to the trust money for a period not exceeding 60 days from the date of the expiration of the 120 day period as provided in subsection (2), subject to such terms and conditions including costs as the judge sees fit. 1973, c.62, s.8; 1979-80, c.92, s.58.
19 The trust is not affected by the fact that the time for registering a claim of lien under this Act has expired.	19 This section codifies the case law. Although the lien period may have expired the ability to pursue a trust claim continues.	New
PART III THE LIEN		
20(1) A person who provides services or materials upon or in respect of an improvement for an owner, contractor or subcontractor, has a lien upon the estate or interest of the owner in the land occupied by the improvement,	20(1) There is no material change.	12(1) Any person who does or causes any work to be done or services rendered upon or in respect of an improvement or furnishes any material to be used in or on an improvement for an owner, contractor

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or enjoyed therewith and on the materials provided to the improvement for the price of those services or materials.		or subcontractor has, except as otherwise provided in this Act, a lien upon the estate or interest of the owner in the land occupied by the improvement or enjoyed therewith for so much of the price of the work, services or material as remains owing to him.
(2) Where services or materials are provided: (a) preparatory to; (b) in connection with; or (c) for an abandonment operation in connection with; the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials, the lien given by subsection (1) is also a lien on: (d) all the estates or interests of persons holding a real property interest in the mines and minerals, in addition to the owner, other than the fee simple estate, unless the person holding the fee simple estate has expressly requested the services or materials; (e) the mineral when severed and recovered from the land while it is in the hands of the owner, and to the proceeds thereof and to the amounts to be paid in lieu thereof to the owner by a person that operates the mine, oil well or gas well in accordance with an order or	20(2) This subsection is amended to make it clear that the lien is imposed upon real property interests and is not intended to affect any pre-existing financing on the mineral or proceeds derived from the mineral.	12(2) Where work is done, services are rendered or materials are furnished: (a) preparatory to; (b) in connection with; or (c) for an abandonment operation in connection with; the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done, the services to be rendered or the material to be furnished, the lien given by subsection (1) attaches to all the estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding the fee simple estate in the mines and minerals has expressly requested the work or services or the furnishing of materials in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to the person's estate or interest, if any, in the remainder of the land. (3) A lien attaching to an estate or interest in mines and minerals

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regulation made under The Mineral Resources Act or The Oil and Gas Conservation Act; (f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines, mining claim or land, oil or gas well and the appurtenances thereto; and, in all other respects, this Act applies to the lien existing by virtue of this subsection.		attaches also to the minerals when severed and recovered from the land while they are in the hands of the owner, and to the proceeds thereof and to the amounts to be paid in lieu thereof to the owner by a person that operates the mine, oil well or gas well in accordance with an order or regulation made under The Mineral Resources Act. (4) A person who has a lien under subsection (1) in respect of any mine, mining claim, mining land, oil well or gas well shall also have a lien upon the interest of the owner in the fixtures, machinery, tools, appliances, equipment and other property in or on the mine, mining claim, mining land, oil well or gas well, and the appurtenances thereto. 1973, c.62, s.12.
(3) No person is entitled to lien for any interest on the amount owed to him in respect of the services or materials that have been provided by him, but nothing in this subsection affects any right that he may otherwise have to recover that interest.	20(3) This section is inserted to ensure that no lien can be claimed for interest. Interest does not improve the land and in a pro rata distribution of the holdback should not be a factor in determining the percentage payable to each claimant. This does not preclude the parties from providing for interest but no lien for interest will exist under the Act.	New
(4) No lien exists for a claim less than $100.	20(4) The minimum amount of the claim of lien is increased from $50 to	30(5) No claim of lien shall be registered, and no claim of lien that is not registered as of the

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	$100. By providing that liens for less than this amount do not exist, a problem is eliminated with respect to distribution under the Act.	date upon which this Act comes into force is capable of enforcement under this Act, where the amount claimed as due or the aggregate of the amount claimed as due by a number of persons uniting in accordance with section 32, does not exceed $50. 1973, c.62, s.30.
(5) An architect or engineer, or an employee of an architect or engineer, who provides architectural or engineering services upon or in respect of an improvement: (a) does not have a lien upon or in respect of the land for such architectural or engineering services; and (b) is not a contractor, subcontractor or labourer for the purposes of this Act.	20(5) At the request of the Association of Professional Engineers and the Saskatchewan Architects Association, engineers and architects providing architectural or engineering services to an improvement, and their employees, do not have a lien under the Act.	New
21(1) A lien does not attach to and cannot be registered against the estate or interest of the Crown in land. (2) Where an improvement is made to land in which the Crown has an estate or interest, but the Crown is not an owner, the lien may attach to the interest of any other person in that land. (3) Where the Crown is an owner the lien does not attach to the land but constitutes a charge as provided in section 28, and this Act applies without requiring the registration of	21(1), 21(2) and 21(3) No material change.	62(1) Notwithstanding section 12 or 17, where an improvement mentioned in subsection 12(1) is a public work, the lien created by that section does not attach to the land occupied by the improvement or enjoyed therewith, but constitutes a lien and charge on the amounts directed to be retained by section 19.

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a claim for lien against the land.		
22 A person's lien arises and takes effect when he first provides his services or materials to the improvement.	22 No material change.	15 The time when a lien arises is the time when work is begun or when any service is first rendered or the first material is furnished. 1973, c.62, s.15.
23(1) Subject to Part IV, a lien does not attach so as to make an owner liable for a greater amount than the amount payable by the owner to the contractor.	23(1) No material change.	18(1) Except as otherwise provided in this Act, the lien does not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.
(2) Subject to Part IV, where a lien is claimed by a person other than the contractor, the amount that may be claimed is limited to the amount owing to the contractor or subcontractor or other person for whom the services or materials have been provided.	23(2) No material change.	18(2) Except as otherwise provided in this Act, where the lien is claimed by a person other than the contractor the amount that may be claimed in respect thereof is limited to the amount owing to the contractor or subcontractor or other person for whom the work has been performed, the services rendered or the materials furnished. 1973, c.62, s.18.
(3) Subject to Part IV, in determining the amount of a lien under subsection (1) or (2), there may be taken into account the amount that is, as between a payer and the person he is liable to pay, equal to the balance in the payer's favour of all outstanding debts, claims or damages, that are related to the improvement.	23(3) This section codifies the case law that amounts above the holdback are subject to an accounting between the parties and may be set off against claims arising out of the improvement.	New
24 Where an owner enters into a single contract for improvements on	24 This section is intended to provide a remedy for those lien	New

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more than one parcel of land owned by him, any person providing services or materials under that contract, or under a subcontract under that contract, may choose to have his lien follow the form of the contract and be a general lien against each parcel for the price of all services and materials he provided to all parcels of land.	claimants who are providing services and materials pursuant to one contract to a number of improvements owned by one owner. In such a case, the lien claimant may choose to have his lien follow the form of the contract and lien each parcel for the full amount of the lien subject to equal apportionment at some later date.	
25 Where land is held jointly or in common by the owner and another person, the joint or common interest of the other person is also subject to the lien unless the contractor receives written notice, within 10 days after the first lien arises, that the other person assumes no responsibility for the improvement.	25 In the case of joint ownership, all interests are subject to the lien unless the contractor is advised to the contrary in writing within 10 days of the commencement of work on the improvement. This change is intended to provide greater security to a lien claimant. It is assumed in the majority of cases, the joint owner will gain the benefit of any improvement.	16(1) Where work is done, services are rendered or material is furnished in respect of land in which a married person has an estate or interest and the work is done, services rendered or material furnished with the privity of the spouse of the married person, the spouse is, for the purposes of this Act, conclusively presumed to be acting as the agent of the married person as well as for himself. (2) The presumption arising under subsection (1) applies only in respect of that part of the work done, services rendered or portion of the materials furnished before the person doing the work, rendering the services or furnishing the materials has had actual notice that the spouse is not the agent of the married person who has an estate or interest in the land. 1973, c.62, s.16.
26(1) For the purposes of this section, "landlord" includes any	26(1), 26(2), 26(3) and 26(4) The present section which requires the	17(2) Where the interest or estate charged by the lien is leasehold the land itself may also with the consent of the owner thereof be

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holder of a leasehold interest who has sub-leased his interest and the holder of the fee simple estate. (2) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord is also subject to the lien if the landlord consents in writing, for the purposes of this Act, to the improvement to be made. (3) A lien against the interest of the landlord established by this section is limited to and does not attach so as to make the landlord liable for more than the value of the holdback that the owner is required to retain. (4) Where the landlord has consented in accordance with subsection (2), no forfeiture of a lease, or termination of a lease by a landlord deprives any person who has a lien against the leasehold estate or the estate or interest of the landlord from the benefit of his lien.	landlord's consent on the claim of lien precludes the landlord's interest from being attached by the lien in all cases. The change proposed is that if the landlord consents in writing to the improvement the lien will also attach to the estate of the landlord. This gives the contractor or tenant an opportunity, before commencing work, to obtain the consent of the landlord to the improvement to provide greater security for the contractor and any lien claimant. Of course, the consent may be obtained at any time but it is unlikely that consent would be forthcoming after the improvement was begun. The liability of the landlord is limited to the value of the holdback. The Committee felt that this was a good compromise between the existing provision and a provision which could see the landlord assuming full responsibility if he gives his consent to the improvement. Forfeiture of the lease for whatever reason will not affect the lien.	subject to the lien provided the consent is attested by the signature of the owner upon the claim of lien at the time of registration thereof and duly verified. 1973, c.62, s.17.
27(1) In this section, "common property", "condominium plan", "corporation", "owner" and "unit" have the meanings ascribed to them by section 2 of The Condominium Property Act.	27(1), 27(2) and 27(3) Services or materials provided to a unit whether at the request of the owner or the corporation will result in a lien arising on the unit only. A lien may only be registered against the plan	13(1) In subsection (2) the expressions "common property", "condominium plan", "corporation", "owner" and "unit" have the meanings as ascribed to them by section 2 of The Condominium Property Act. (2) Subject to sections 29 and 37 but otherwise notwithstanding anything in this Act: (a) where, on the request of the owner of a unit:

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(2) Where services or materials are provided in respect of a unit, any lien that arises is upon the estate of the owner in that unit and his share in the common property and any claim of lien accepted for registration with respect to a unit shall be registered against the certificate of title for that unit. (3) Where services or materials are provided in respect of the common property, any lien that arises is upon the estates of all the owners in all the units and the common property and any statement of lien accepted for registration with respect to the common property shall be registered against the condominium plan and not against the certificate of title to any unit.	if it is intended that all units will be charged by the lien.	(i) work is done upon or in respect of that unit; or (ii) material is furnished to be used in that unit; any lien that arises under this Act in consequence thereof is upc the estate of the owner in that unit and his share in the common property; and any statement of lien filed in respect thereof shall be registered against the title to that unit; (b) where, on the request of a corporation: (i) work is done upon or in respect of the common property or any unit, or both; or (ii) material is furnished to be used in the common property or any unit, or both; intended for the benefit of the common property generally, any lien that arises under this Act ir consequence thereof is upon the estates of all the owners in all the units and the common property; (c) where, on the request of a corporation: (i) work is done upon or in respect of any unit; or (ii) material is furnished to be used in any unit; intended for the benefit of that unit, any lien that arises under this Act in consequence thereof is upon the estate of the owner in that unit and his share in the common property;

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		(d) where a statement of lien is filed with respect to any lien referred to in clause (b) or (c), the statement of lien shall be registered against the condominium plan and not against the title to any unit. 1973, c.62, s.13; 1973-74, c.61, s.3.
28 The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 23(3), is a charge upon any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the provision of services or materials giving rise to the lien.	28 Although there is a drafting change in this section, there is no material change in the present law. Under the existing Act a lien exists for the unpaid amounts due and payable with respect to the improvement.	19(1) Subject to subsection (4), in all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under this Act shall as the work is done, services are rendered or materials are furnished under the contract retain for the statutory period 20% of the value of the work done, services rendered or materials furnished irrespective of whether the contract provides for periodic payments or payment on completion of the work, services or furnishing of the materials or otherwise, as the case may be.
PART IV THE HOLDBACK		
29(1) Each payer upon a contract or subcontract under which a lien may arise under this Act, shall retain a holdback equal to 10% of the greater of: (a) the value of the services or materials as they are actually	29(1), 29(2), 29(3) and 29(4) The principal change brought about by this section is the rationalization of the holdback to one percentage for all contracts and a selection of 10% as the applicable rate of holdback. One rate was chosen to eliminate the	19(2) Every lien is a charge upon the amount directed to be retained by subsection (1) in favour of the lienholders whose liens are derived under the persons to whom the moneys so required to be retained are respectively payable.

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provided under the contract or subcontract; or (b) the amount of any payment made on account of the contract or subcontract price. (2) The obligation to retain the holdback under subsection (1) applies irrespective of whether the contract or subcontract provides for periodic payments or payment on completion. (3) The value mentioned in subsection (1) shall be calculated on the basis of the contract price or, if there is no specific price, on the basis of the actual value of the services or materials. (4) Subject to subsection 32(7), a mortgagee, who is authorized by the owner to disburse the moneys secured by a mortgage, may retain the amount required to be retained by the owner as the payer on the contract and the retention by the mortgagee of such amount shall be deemed to be compliance with this section by the owner.	confusion which existed as to whether the reference to contract price was a reference to the total cost of the improvement or the individual contracts with the subcontractors on the site. The holdback is lowered to meet the claims of the construction industry that a holdback of 15% requires the contractor to finance a portion of the improvement in order to pay any labourer or supplier the full amount owing. A holdback of 10% more closely approximates the profit to be earned on the site and thereby eliminates the need to finance the holdback. This is expected to generate a reduction in the cost of construction. The selection of 10% follows a trend begun in Ontario, Manitoba and British Columbia.	(3) The values mentioned in subsection (1) shall be calculated on the basis of the contract price or, if there is no specific price, on the basis of the actual value of the work, services and materials. (4) Where the contract price or, if there is no specific price, the actual value of the work, services and materials exceeds $25,000, the amount to be retained shall be equal to 15% instead of 20% of the value of the work, services and materials calculated according to subsection (3); but in no case shall the amount retained be less than the amount that would be required to be retained pursuant to subsection (1) or (3) if the value of the work, services and materials was exactly $25,000.
	The payer is allowed to retain a holdback equal to 10% of the amount of any payment as long as the amount retained is not less than the value of the services or materials provided to the improvement. This change provides an answer to a payer who is by contract required to make an advance before the improvement is begun.	21 A mortgagee who is authorized by the owner to disburse the moneys secured by a mortgagee may retain the amount required to be retained by the owner as the person primarily liable on the contract and the retention by the mortgagee of such amount shall be deemed to be a compliance with section 19 by the owner as the person primarily liable on the contract. 1973, c.62, s.21.
	A mortgagee may continue to retain the holdback on behalf of an owner in any case where the holdback is not deposited in the joint holdback trust account.	

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30(1) Where the contractor or subcontractor defaults in the performance of his contract or subcontract, the holdback shall not be applied to the completion of the contract or subcontract, to the payment of damages for non-completion of the contract or subcontract, in payment or satisfaction of any other claim against the person in default or for any other purpose to remedy the default.	30(1) No material change.	19(5) Where the contractor or subcontractor makes default in completing his contract, the percentage shall not, as against any lienholder or any person claiming a charge and who, by reason of subsection (2), has a charge thereon, be applied by the owner, contractor, subcontractor or by a court or judge to the completion of the contract or for any other purpose and shall not be applied to the payment of damages for the non-completion of the contract by the contractor or subcontractor and shall not be applied in payment or satisfaction of any other claim against the contractor or subcontractor, as the case may be. 1973, c.62, s.19.
(2) Where a payer on a contract or subcontract is required by this Act to release the holdback and fails to do so within the time provided, such payer is liable to anyone who suffers loss or damage as a result of the failure.	30(2) One of the criticisms directed at the present Act is that it provides no consequences if the owner fails to release the holdback within the time provided. Subsection 30(2) is intended to provide some incentive to an owner to release the holdback by establishing a cause of action for anyone suffering loss or damage as a result of such failure.	New
(3) Every contract and subcontract is deemed to be amended insofar as is necessary to make it conform with the provisions of this Act which govern the retention and payment of the holdback.	30(3) This subsection is intended to address the problem which arises with respect to the retention and payment of the holdback. Although no one can waive the provisions of the Act, many contracts do not provide that	New

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	payments shall be made in accordance with The Mechanics' Lien Act and require full progress payments at specified times. The scheme of holdbacks under the act envisages that only the owner is required to holdback. For all other payers on subcontracts the requirement to holdback is satisfied by the fact that the payer above them has retained the holdback which is also the answer to any person who would otherwise be entitled to receive full payment. This subsection amends all contracts to recognize the holdback. Again, with respect to payment of the holdback, the Act directs that the holdback is inviolable. It cannot be claimed by anyone other than the lien claimant and, if it is owing, must be paid after the statutory period has expired.	
31(1) An owner is personally liable to those lien claimants who have valid liens against his interest in the land to the extent of any deficiency in the holdback that he is required to retain under this Part. (2) The personal liability of an owner under subsection (1) may only be determined in an action under this Act.	31(1) and 31(2) This new section is a further confirmation of the need to provide maximum protection to the lien claimant. Under the present law, a deficiency in the holdback following the sale of the land, between a contractor and a subcontractor, will result in a judgment against the contractor. With this proposal the owner, who has failed to retain the holdback, remains directly responsible to all lien claimants for any deficiency.	New
32(1) Subject to subsection (10),	32(1), 32(2) and 32(3) This section	New

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every owner, other than the Crown, shall pay the holdback into a holdback trust account maintained at any chartered bank, credit union or trust company. (2) All amounts deposited into the holdback trust account shall be held in trust for all of those persons who have a lien on the holdback. (3) The holdback trust account shall be established and administered jointly by the owner and the contractor, as trustees, but where the relationship between the owner and the contractor is one of agency or where the owner is his own contractor, the holdback trust account shall be administered jointly by the owner and one of the contractors or subcontractors, of the owner's choosing, as trustees, and in such cases, there is required to be established only one holdback trust account. (4) Unless otherwise ordered by the court, all payments out of the holdback trust account require the signature of both trustees, who have established the holdback trust account, and where anyone has a lien on the holdback, at the time of payment out from the holdback trust account, the trustees shall, wherever possible, prepare the cheques from the holdback trust account directly to the person who has a lien on the holdback, according to his proportionate share.	establishes the joint holdback trust account. All owners, except the Crown and owners of certain residential projects, are required to establish an account to be held jointly with the contractor in trust for all lien claimants. By providing a mechanism to compel an owner to establish such an account, it is hoped that the holdback will be available and thereby provide greater security where the land is sold to meet the claims of lienholders but the interest of a prior mortgagee with accrued interest exceeds the equity of the owner in the land. Deposit of the holdback in the joint holdback trust account should encourage early release of the holdback. The owner's cost of borrowing will be greater than the money earned on the account which will, in most cases, be less than the interest owing to any person entitled to the holdback. The holdback requires the joint signatures of the owner and the contractor. In the event that there is more than one contractor the owner may select one of the contractors to jointly administer the account with him. The section encourages the joint trustees to write one cheque directly to the person entitled and thereby avoid the writing of a cheque to one of the joint trustees and then	

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(5) Upon the application of the owner and upon such notice as the court finds appropriate, the court may provide directions with respect to the administration of the trust; and may, if the court is satisfied that the holdback trust account will be established and maintained, declare that the owner may establish and maintain a trust account as sole trustee. (6) Upon the application of any person entitled to claim a lien under this Act, the court may, having regard to all circumstances including the relationship between an owner and a subcontractor, substitute another subcontractor for the subcontractor chosen by the owner or otherwise make any order, appropriate in the circumstances, to ensure that the holdback trust account will be maintained for the benefit of those persons who have provided services or materials to the improvement. (7) Where a joint holdback trust account is established and the holdback is deposited therein, no mortgagee may retain the amount required to be retained by an owner in satisfaction of the owner's obligation to retain the holdback and, if a mortgagee does retain such an amount, the mortgagee is liable to anyone suffering loss or damage as a result. (8) Interest accruing on all amounts deposited into the holdback trust	to the proper payee. The court may give directions with respect to the account and appoint a sole trustee. Interest accruing on the holdback will be payable according to the agreement of the trustees. In the absence of such an agreement, the interest belongs to the owner. This decision is a necessary adjunct of the joint holdback trust account concept. If the trustees were required to calculate the amount of interest actually earned on a particular portion of the holdback, the administrative costs of the account would be punitive and would thrust the industry into controversy over a relatively small portion of the money earned with respect to the improvement. The fact that this interest is not payable to the person entitled to the holdback does not mean that interest is not otherwise payable. The requirement to maintain a joint holdback trust account does not apply to the portion of the residential construction industry as described. The assumption is made that the construction pyramid model does not exist in this industry. Most persons providing services and materials in this industry contract directly with the owner who remains fully liable to those persons.	

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account shall be distributed according to the agreement of the trustees, or where the owner is the sole trustee, or in the absence of agreement accrues to the owner. (9) Where there is more than one owner, only one of the owners is required to establish and administer the holdback trust account with the contractor, or other trustee, as the case may be. (10) This section does not apply to a contract for services or materials provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit.		
33(1) A payer may, without jeopardy, make payments on a contract or subcontract up to 90 per cent of the contract or subcontract price unless, prior to making payment, the payer receives written notice of a lien or a claim of lien is registered.	33(1) It was the Committee's view that a payer should be able to make all payments above the holdback freely in accordance with his contract unless he has received written notice of a lien, a defined phrase, or a claim of lien has been registered, again according to the definition of "registered". The uncertainty surrounding what constitutes good faith is removed. Only notice or registration of a lien will have the effect of staying the hand of the paymaster.	20(7) All payments up to 80% as fixed by subsection 19(1) or up to 85% as fixed by subsection 19(4) and payments permitted as a result of the operation of this section made in good faith by an owner to a contractor or by a contractor to a subcontractor or by one subcontractor to another subcontractor before notice in writing of the lien is given by the person claiming the lien to the owner, contractor or subcontractor, as the case may be, operate as a discharge pro tanto of the lien.
(2) Where a payer receives written notice of a lien or a claim of lien is registered and retains, in addition to the holdback, an amount	33(2) A payer who has received written notice of a lien or who discovers that a lien is registered may continue to make payments as long	New

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sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the contract or subcontract price, less the amount retained.	as a sufficient amount to satisfy the lien is retained over and above the holdback.	
34(1) Subject to subsection (10), where a subcontract has been certified complete, each payer upon the contract and any subcontract shall, if the money is otherwise due and payable under the contract or subcontract, without jeopardy, make payment reducing the holdback to the extent of the amount of holdback he has retained in respect of the completed subcontract 45 clear days after the certificate of completion has been given if no claim of lien has been registered. (2) On the application of the contractor or the subcontractor on the subcontract, the payment certifier on the contract, or if there is no payment certifier, the owner and the contractor jointly, shall within 10 days of the application, determine in accordance with subsection 3(3), whether the subcontract has been completed, and where he or they so determine, he or they shall certify the completion of the subcontract by signing a certificate in the prescribed form. (3) Within 7 days of the date the subcontract is certified to be complete, the payment certifier or	34(1), 34(2), 34(3), 34(4), 34(5), 34(6), 34(7), 34(8), 34(9) and 34(10) The present law is unclear as to whether the concept of substantial performance applies to subcontracts. Some authors have expressed the opinion that it does not and that the reference to "completion" in subsection 20(1) is a reference to total completion. The Committee felt that it should be possible for the holdback to be released on a subcontract completed before substantial performance of the main contract and that a definition of "completion" should be provided which would require something less than total completion. Release of the holdback could then be made within 45 days of subcontract completion or in the case of certain kinds of residential construction, as described, 67 days. The owner and the contractor may jointly determine whether the subcontract is complete in cases where a professional payment certifier has not been retained. The person(s) certifying the contract have seven days from certifying the	20(1) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and the statutory period has elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 20% or 15%, as the case may be, of the subcontract price or, if there is no specific subcontract price, by 20% or 15%, as the case may be, of the actual value of the work done, services rendered and materials furnished under that subcontract; but this subsection does not operate if and so long as any lien derived under that subcontract is preserved by anything done under this Act. (2) The contractor or subcontractor may at any time after the completion of a contract or subcontract demand a certificate of completion in respect of the contract or

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the owner and the contractor, as the case may be, shall: (a) give a copy of the certificate to the subcontractor whose subcontract has been certified complete; (b) give a copy of the certificate to the owner and the contractor, where certification is by the payment certifier; (c) give a copy of the certificate to all persons providing services or materials in the performance of the subcontract who have requested the payment certifier, or where there is no payment certifier, the owner, in writing, by personal service with a return address, to give them a copy of the certificate; and (d) post a copy of the certificate in a prominent spot on the main job site. (4) Where there is a failure or refusal to certify completion within the 10 days limited for so doing, any person may apply to the court, and the court, upon being satisfied that the subcontract is complete, and upon such terms as to costs or otherwise as it considers fit, may certify that the subcontract is complete, and the certification has the same effect as a certification of completion in accordance with subsection (2) of this section and the person applying for the certification shall give and post copies as required by subsection	subcontract to give copies of the certificate to the interested parties and to post a copy of the certificate on the main job site. The certificate is not effective unless there is proper publication.	subcontract from the architect, engineer or other person mentioned in subsection (1), which demand shall be made in writing and may be delivered to the architect, engineer or other person or sent to him by registered mail; and the contractor or subcontractor making the demand shall give or send by registered mail to the owner or his agent, as the case may be, a copy of the demand. (3) The architect, engineer or other person of whom the demand for the certificate of completion is made, shall within 10 days after receipt of the demand: (a) issue and give or send by registered mail to the contractor or subcontractor, as the case may be, and to the owner or his agent the certificate of completion applied for; or (b) give or send by registered mail to the contractor or subcontractor, as the case may be, and to the owner a notice that he refuses to issue the certificate of completion, stating in the notice full reasons for the refusal and full particulars upon which the reasons are based. (4) Where a demand for a certificate of completion, a certificate of completion or a notice under clause (3)(b) is sent by registered mail, it shall be deemed to have been received on the date of the receipt given by the postmaster for the registered letter in which it was sent.

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(3). (5) A certificate of completion is not effective unless it is given in accordance with subsection (3). (6) Where a certificate of completion is given pursuant to this section, the subcontract is deemed to be completed not later than the day on which the certificate was so given. (7) Any person who is required to make a determination of completion of a subcontract, and who, after receiving an application fails or refuses within the time set out by subsection (2) to certify the completion of the subcontract, even though there is no reasonable doubt that the contract has, in fact, been completed, is liable to anyone who suffers damages as a result. (8) A payment certifier or the owner and the contractor, as the case may be, who fails or refuses to comply with subsection (3) is liable to anyone who suffers damages as a result. (9) Where a certificate of completion is given by registered mail, it shall be deemed to be given when the addressee actually receives it, or two clear days after the day of registration, whichever is earlier, which time shall be included in the days allotted for the giving of the certificate. (10) Where services or materials are provided to a house or provided in connection with repairs or		(5) Where the architect, engineer or other person of whom a demand for a certificate of completion is made neglects or refuses to issue or deliver the certificate of completion within the 10 days limited for so doing, a judge may: (a) upon application by the contractor or subcontractor desiring the certificate of completion; (b) upon notice being given to, and upon hearing, such persons as the judge considers advisable; and (c) upon being satisfied that the contract or subcontract has been completed; make an order, upon such terms and conditions as to costs or otherwise as may seem just, that the contract or subcontract has been completed, and the order has the same force and effect as if the certificate of completion had been issued by the architect, engineer or other person. (6) Where a certificate of completion of the contract or subcontract has been issued by an architect, engineer or other person or where a judge has made an order pursuant to subsection (5) to the effect that a contract or subcontract has been completed, that contract or subcontract and any work done or to be done or services rendered or to be rendered thereunder and any materials furnished or to be furnished shall, for the purposes of section 36 and

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renovations to a four-plex or condominium unit, the period mentioned in subsection (1) is 67 days.		so far as concerns any lien thereunder of that contractor or subcontractor, be deemed to have been completed, done, rendered or furnished not later than the time at which the certificate was so given or the order was made.
35(1) Subject to section 32 and subsection (10), where a certificate of substantial performance has been given, each payer upon the contract and any subcontract shall, if the money is otherwise due and payable under the contract or subcontract, without jeopardy, make payment of the amount of the holdback, calculated as of the day of substantial performance, 45 clear days after the day the certificate of substantial performance is given, if no claim of lien has been registered. (2) On the application of the contractor, the payment certifier, or if there is no payment certifier, the owner and the contractor jointly, shall, within 10 days after the day of the application, determine, in accordance with subsection 3(1), whether the contract has been substantially performed and where he or they so determine, shall certify	35(1), 35(2), 35(3), 35(4), 35(5), 35(6), 35(7), 35(8), 35(9) and 35(10) This section makes it clear that the concept of substantial performance applies to the main contract. The rules with respect to substantial performance of the main contract are the same as those for obtaining a certificate of completion of a subcontract, with, of course, distinct definitions of "completion" and "substantial performance".	20(1) Where a contract is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made and the statutory period has elapsed after a certificate issued by that architect, engineer or other person to the effect that the subcontract has been completed to his satisfaction has been given to the person primarily liable upon that contract and to the person who became a subcontractor by a subcontract made directly under that contract, the amount to be retained by the person primarily liable upon that contract shall be reduced by 20% or 15%, as the case may be, of the subcontract price or, if there is no specific subcontract price, by 20% or 15%, as the case may be, of the actual value of the work done, services rendered and materials furnished under that subcontract; but this subsection does not operate if and so long as any lien derived

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the substantial performance by signing a certificate in the prescribed form.

(3) Where a contract has been certified to be substantially performed, the payment certifier or, where there is no payment certifier, the owner, shall by personal service or by registered mail within 7 days after the day the certificate was signed:

(a) give a copy of the certificate to the owner and contractor, and in the case of the owner, give a copy of the certificate to the contractor;

(b) give a copy of the certificate to all persons providing services or materials in the performance of the contract who have requested the payment certifier or where there is no payment certifier, the owner, in writing, by personal service with a return address, to give them a copy of the certificate; and

(c) post a copy of the certificate in a prominent spot on the main job site.

(4) Where there is a failure or refusal to certify substantial performance within the 10 days limited for so doing, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may certify that the contract has been

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under that subcontract is preserved by anything done under this Act.

(2) The contractor or subcontractor may at any time after the completion of a contract or subcontract demand a certificate of completion in respect of the contract or subcontract from the architect, engineer or other person mentioned in subsection (1), which demand shall be made in writing and may be delivered to the architect, engineer or other person or sent to him by registered mail; and the contractor or subcontractor making the demand shall give or send by registered mail to the owner or his agent, as the case may be, a copy of the demand.

(3) The architect, engineer or other person of whom the demand for the certificate of completion is made, shall within 10 days after receipt of the demand:

(a) issue and give or send by registered mail to the contractor or subcontractor, as the case may be, and to the owner or his agent the certificate of completion applied for; or

(b) give or send by registered mail to the contractor or subcontractor, as the case may be, and to the owner a notice that he refuses to issue the certificate of completion, stating in the notice full reasons for the refusal and full particulars upon which the reasons are based.

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substantially performed, and the certification has the same effect as a certification of substantial performance in accordance with subsection (2) of this section and the person applying for the certification shall give and post copies as required by subsection (3).

(5) A certificate of substantial performance is not effective unless it is given to the contractor and the owner, but where the certificate of substantial performance is given by an owner and contractor jointly, it shall be deemed to be given to them.

(6) Where a certificate of substantial performance is given pursuant to this section, the contract is deemed to be substantially performed not later than the day on which the certificate was so given.

(7) Any person who is required by this section to make a determination of substantial performance of a contract, and who, after receiving an application fails or refuses within the time set out by subsection (2) to certify the substantial performance of the contract, even though there is no reasonable doubt that the contract has, in fact, been substantially performed, is liable to anyone who suffers damages as a result.

(8) A payment certifier or owner who fails or refuses to comply with subsection (3) is liable to anyone who suffers damages as a result.

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(4) Where a demand for a certificate of completion, a certificate of completion or a notice under clause (3)(b) is sent by registered mail, it shall be deemed to have been received on the date of the receipt given by the postmaster for the registered letter in which it was sent.

(5) Where the architect, engineer or other person of whom a demand for a certificate of completion is made neglects or refuses to issue or deliver the certificate of completion within the 10 days limited for so doing, a judge may:

(a) upon application by the contractor or subcontractor desiring the certificate of completion;

(b) upon notice being given to, and upon hearing, such persons as the judge considers advisable; and

(c) upon being satisfied that the contract or subcontract has been completed;

make an order, upon such terms and conditions as to costs or otherwise as may seem just, that the contract or subcontract has been completed, and the order has the same force and effect as if the certificate of completion had been issued by the architect, engineer or other person.

(6) Where a certificate of completion of the contract or subcontract has been issued by an architect, engineer or other person

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(9) Where a certificate of substantial performance is given by registered mail, it shall be deemed to be given when the addressee actually receives it, or two clear days after the day of registration, whichever is earlier, which time shall be included in the days allotted for giving the certificate. (10) Where services or materials are provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit, the period mentioned in subsection (1) is 67 days.		or where a judge has made an order pursuant to subsection (5) to the effect that a contract or subcontract has been completed, that contract or subcontract and any work done or to be done or services rendered or to be rendered thereunder and any materials furnished or to be furnished shall, for the purposes of section 36 and so far as concerns any lien thereunder of that contractor or subcontractor, be deemed to have been completed, done, rendered or furnished not later than the time at which the certificate was so given or the order was made.
36(1) Subject to section 32 and subsection (3), where a contract has been certified to be substantially performed, each payer upon the contract or any subcontract shall, if the money is otherwise due and payable under the contract or subcontract, without jeopardy, make payment of the amount of holdback that has been required to be retained since the day of substantial performance, 45 clear days after the earlier of the day the contract is completed or abandoned if no claim of lien has been registered. (2) The amount of the holdback mentioned in subsection (1) is to be	36(1), 36(2) and 36(3) This section is intended to provide protection to those persons providing services or materials after the day of substantial performance by stipulating that the holdback retained after that day is intended for the benefit and value of such services and materials. Release of this holdback does not require a certificate of completion. It is assumed that with the definition of completion the parties can determine whether this event has occurred without the stricture of the rules provided for substantial performance.	New

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distributed only to those persons who have provided services or materials after the day of substantial performance and only to the extent of the value of those services and materials. (3) Where services or materials are provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit, the period mentioned in subsection (1) is 67 days.		
37(1) Subject to subsection (2), where no certificate of substantial performance of the contract has been given pursuant to section 35, each payer upon the contract and any subcontract shall, if the money is otherwise due and payable under the contract or subcontract without jeopardy, make payment of the holdback, 45 clear days after the earlier of the day the contract is completed or abandoned if no claim of lien has been registered. (2) Where services or materials are provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit, the period mentioned in subsection (1) is 67 days.	37(1) and 37(2) Where no certificate of substantial performance is given, the payer is directed to release the holdback following expiration of the statutory period if no lien is registered.	20(8) Payment of the percentage required to be retained by section 19 may be validly made so as to discharge all liens under this Act in respect thereof after the expiration of the statutory period, unless in the meantime: (a) a claim of lien is registered; (a.1) a notice is given pursuant to section 62; or (b) an action is commenced under this Act to enforce any lien.
38(1) Notwithstanding sections 35 to 37 where the contract price is in excess of twenty-five million dollars	38(1), 38(2) and 38(3) On contracts for large projects, this section provides for an annual release of the	New

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or such greater amount as may be prescribed and where the contract provides for a completion date in excess of one year, each payer upon the contract and any subcontract shall, following each yearly anniversary if the money is otherwise due and payable, under the contract or subcontract, without jeopardy, make payment of the amount that has been required to be retained, calculated as of the day of each yearly anniversary of the day services or materials were first provided, 45 clear days after the day notice of the early release of the holdback is given and posted pursuant to section 35 if no claim of lien has been registered. (2) Whether the contract price is in excess of twenty-five million dollars or such greater amount as may be prescribed shall be determined as of the day of execution of the contract, and not as a result of any amendments to the contract. (3) During the last year of the contract, sections 35 to 37 apply mutatis mutandis to the contract mentioned in subsection (1).	holdback. Whether the contract price is in excess of 25 million dollars must be determined as of the day the contract is executed. This precludes amendments to the contract increasing the value for the purposes of this section. It is not intended that this section apply to cost plus contracts.	
39(1) An owner, contractor or subcontractor may give three clear days' written notice, of his intention to pay a person having a lien for or on account of an amount owing to that person for services or materials provided to the	39 If a payment is made pursuant to the proposed section the proper payer cannot claim that the payment was improperly made.	22 Where an owner, mortgagee, contractor or subcontractor: (a) makes a payment to a person entitled to a lien for or on account of a debt justly due to that person for work done,

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improvement, to the proper payer of that person. (2) Where the proper payer fails to object within the time provided, the owner, contractor or subcontractor may pay the lienholder directly and such payment shall be deemed to be a payment by the owner, contractor or subcontractor to the proper payer and the proper payer is estopped from claiming that the payment was improperly made. (3) The payment made pursuant to subsection (2) does not reduce the amount of the holdback required to be retained by section 29.		services rendered or materials furnished for any of the purposes mentioned in section 12 and for which the owner, mortgagee, contractor or subcontractor is not primarily liable on the contract; and (b) within three days afterwards gives written notice of the payment to the person primarily liable on the contract or his agent; the payment shall be deemed to be a payment on the contract with the person primarily liable, but not so as to affect the percentage to be retained under section 19. 1973, c.62, s.22.

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40 Payments made in accordance with this Part operate as a discharge of the lien to the extent of the amount paid.	40 This section confirms the scheme of the Act which reduces the liens of all persons providing services and materials as each payment is made in accordance with the Act.	New
PART V EXPIRY, REGISTRATION AND DISCHARGE OF LIENS		
41(1) Unless a claim of lien is registered pursuant to sections 42, 43 or 44 a lien expires as provided in this section. (2) Subject to subsection (4), the lien of a contractor: (a) for services or materials provided on or before the day of the yearly anniversary of a contract mentioned in section 38 expires 45 clear days after the day on which a notice of early release of the holdback is given as provided in section 38; (b) for services or materials provided on or before the day certified to be the day of substantial performance of the contract, expires 45 clear days after the day on which a copy of the certificate of substantial performance is given as provided in section 35; (c) for services or materials provided to a house or provided in connection with repairs or	41(1), 41(2), 41(3) and 41(4) Section 41 marks the establishment of a fixed statutory period for the registration of liens. In the case of liens arising in some parts of the residential construction industry, the period is set at 67 days. For other liens, the period is 45 clear days. The Committee is recommending a fixed period commencing from one particular day for all lien claimants to encourage the release of the holdback. The unending lien period made it difficult for the cautious payer to release the holdback adding costs to construction and resulting in industry failures. Subsection (4) is inserted to ensure that a person providing services or materials before and after the day from which the statutory period commences has a separate lien for each period and the expiry of the lien before the day mentioned does not affect the lien arising after	36(1) A claim of lien by a contractor or subcontractor may, in cases not otherwise provided for, be registered: (a) at any time during the performance of the contract or subcontract; (b) within the period 37 days after the completion, abandonment or other termination of the contract or subcontract, as the case may be; or (c) in the case of oil or gas wells, or oil or gas pipe lines, at any time during the performance of the contract or subcontract or within the period of 60 days after the completion, abandonment or other termination of the contract or subcontract, as the case may be. (2) A claim of lien for materials may be registered: (a) at any time during the furnishing thereof; (b) within the period of 37 days after the furnishing of the last material so furnished; or

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renovations to a four-plex or condominium unit on or before the day certified to be the day of substantial performance of the contract, expires 67 days after the day on which a copy of the certificate of substantial performance is given as provided in section 35;

(d) for services or materials provided after the day certified to be the day of substantial performance, or where no certificate of substantial performance is given pursuant to section 35, expires 45 clear days after the earlier of:

(i) the day the contract is completed; and

(ii) the day the contract is abandoned; and

(e) for services or materials provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit after the day certified to be the day of substantial performance, or where no certificate of substantial performance is given pursuant to section 35, expires 67 days after the earlier of:

(i) the day the contract is completed; and

(ii) the day the contract is abandoned.

(3) Subject to subsection (4), the lien of any other person:

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that day.

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(c) in the case of oil or gas wells, or oil or gas pipe lines, at any time during the furnishing thereof, or within the period of 60 days after the furnishing of the last material so furnished.

(3) A claim of lien for work, services or wages may be registered at any time during the doing of the work or rendering of the services or within the period of 37 days after the last day's work was done or services were rendered.

(4) In the case of a contract that is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made, the claim for a lien by a contractor or subcontractor may be registered within the time mentioned in subsection (1) or within seven days after:

(a) the architect, engineer or other person has given his certificate of completion or has, upon a demand for the certificate being made to him by the contractor or subcontractor, refused to issue the certificate; or

(b) the date of the issuance of an order of a judge under subsection 20(5). 1973, c.62, s.36.

37(2) A claim of lien may be registered and an action may be commenced after the expiration of the statutory period and the lien is valid except as against:

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(a) for services or materials provided on or before the day of the yearly anniversary of a contract mentioned in section 38 expires 45 clear days after the day on which a notice of early release of the holdback is given as provided in section 38; (b) for services or materials provided on or before the day certified to be the day of substantial performance of the contract, expires 45 clear days after the earlier of: (i) the day on which a copy of the certificate of substantial performance is given, as provided in section 35; and (ii) the day on which a subcontract is certified to be complete under section 34, where the services or materials were provided under or in respect of that subcontract; and (c) for services or materials provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit on or before the day certified to be the day of substantial performance of the contract, expires 67 days after the earlier of: (i) the day on which a copy of the certificate of substantial performance is given, as provided in section 35; and (ii) the day on which a		(a) intervening parties who become entitled to any estate or interest in or a lien or charge upon the land whose claim with respect to the land is registered or protected by the registration of a caveat prior to the registration of the first mentioned lien; or (b) an owner, mortgagee, contractor or subcontractor in respect of payments made in good faith to a contractor, subcontractor or lienholder after the expiration of the statutory period and before any claim of lien is registered and notice thereof is given in writing to the owner, mortgagee, contractor or subcontractor, as the case may be. 1973, c.62, s.37.

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subcontract is certified to be complete under section 34, where the services or materials were provided under or in respect of that subcontract; (d) for services or materials provided after the day certified to be the day of substantial performance of the contract, or where no certificate of substantial performance of the contract is given, expires 45 clear days after the earlier of: (i) the day on which a subcontract is certified to be complete under section 34, where the services or materials were provided under or in respect of that subcontract; and (ii) the day the contract is completed or abandoned; and (e) for services or materials provided to a house or provided in connection with repairs or renovations to a four-plex or condominium unit after the day certified to be the day of substantial performance of the contract, or where no certificate of substantial performance of the contract is given, expires 67 days after the earlier of: (i) the day on which a subcontract is certified to be completed under section 34, where the services or materials were provided under or in respect of that subcontract; and		

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(ii) the day the contract is completed or abandoned. (4) Where a person has provided services or materials on or before the day of the yearly anniversary of a contract mentioned in section 38 or the day certified to be the day of substantial performance of the contract, and has also provided, or is to provide, services or materials after either day, his lien in respect of the services or materials provided on or before either day expires without affecting any lien that he may have for the provision of services or materials after the applicable date.		
42(1) A claim of lien may be registered at any time before the lien expires pursuant to section 41 in the land titles office of the land registration district in which the land is situated. (2) Every claim of lien shall set out: (a) the name and address of: (i) the person claiming the lien; (ii) the owner or the person whom the claimant or the agent of the claimant believes to be the owner; and (iii) the person for whom the materials or services were provided; (b) a short description of the services or materials that were provided; (c) the amount claimed in respect	42 Since the statutory period no longer commences from the day of last supply, the claim of lien need not provide the date upon which materials or services were last provided. The address for service is no longer required to be a Saskatchewan address only. Provision is made for the registration of a general lien subject to possible apportionment by the court. The direction to the Registrar to send notice to the registered owner and any prior mortgagee is a direction currently found in section 256 of The Land Titles Act. The requirement to send these notices by	30(1) Subject to subsection (5) of this section and to section 35, a claim for a lien on land may be registered in the land titles office of the land registration district in which the land is situated. (2) The claim of lien shall set out: (a) the name and address of: (i) the person claiming the lien; (ii) the owner or the person whom the claimant or the agent of the claimant believes to be the owner; and (iii) the person for whom the work was or is being done, the services were or are being rendered or the materials were or are being furnished; (b) the date upon which the last work was done, services rendered or material furnished, or where the claim is registered before the

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of services or materials that have been provided; (d) a description, sufficient for registration, or, where the Crown is the owner, sufficient for identification, of the land or the estate or interest affected; (e) an address for service of the lien claimant. (3) Every claim of lien shall be in the form prescribed executed by the lien claimant, his assignee or an agent and verified by an affidavit of the lien claimant, or an assignee or an agent who has informed himself of the facts set out in the claim, and the affidavit of the lien claimant, agent or assignee shall state that he believes those facts to be true. Registration of general lien (4) Subject to subsection 48(3), a general lien shall be registered against each of the parcels of land that the person having the lien desires the lien to charge, and the claim against each parcel may be for the total amount owing for services or materials that have been provided to all parcels. (5) A claim of lien may include claims against any number of parcels of land owned by the same person and, subject to subsection 20(4), any number of persons claiming liens upon the same parcel of land may join in the claim, but where more than one lien is included in one claim each lien shall be verified by affidavit	registered mail is removed.	work, services or furnishing of material is completed, the time within which the work is to be done, services are to be rendered or material is to be furnished; (c) a short description of the work done or being done, of services rendered or to be rendered or of materials furnished or to be furnished; (d) the sum claimed as due or to become due; (e) a description, sufficient for registration, of the land and estate or interest therein to be charged; and (f) an address for service within the province of the lienholder. (3) The claim of lien may be in form A, B or C and shall be verified by an affidavit in form D of the person claiming the lien or of his agent or assignee who has personal knowledge of the matters required to be verified; and the affidavit of the agent or assignee shall state that he has such knowledge. (4) Where the claim of lien is made by a corporation it shall be verified by the affidavit of an officer or employee of the corporation or its agent who has personal knowledge of the matters required to be verified; and the affidavit of the officer, employee or agent shall state that he has such knowledge. (5) No claim of lien shall be

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as provided in subsection (3). (6) The person claiming the lien may change his address for service by delivering to the registrar notice in writing of the change of address for service which notice refers to the claim of lien and the land affected and the registrar shall enter the change in the instrument register and endorse upon the certificate of title a memorandum setting forth the new address for service of the lienholder.		registered, and no claim of lien that is not registered as of the date upon which this Act comes into force is capable of enforcement under this Act, where the amount claimed as due or the aggregate of the amount claimed as due by a number of persons uniting in accordance with section 32, does not exceed $50. 1973, c.62, s.30.
(7) Upon the registration of a claim of lien, the registrar shall send notice of the registration by ordinary mail to the registered owner of the land and to any mortgagee whose mortgage is registered against the land prior to the registration of the claim of lien.		31 The person claiming the lien may change his address for service by delivering to the registrar notice in writing of the change of address for service and the registrar shall thereupon enter the change in the instrument register and endorse upon the certificate of title a memorandum setting forth the new address in Saskatchewan for service of the lienholder. 1973, c.62, s.31.
(8)Where a claim of lien is registered against a condominium plan the notice mentioned in subsection (7) shall be sent only to the condominium corporation and to any prior mortgagee whose interest is registered on the plan.		32(1) A claim of lien may include claims against any number of parcels of land owned by the same person and any number of persons claiming liens upon the same parcel of land may unite therein; but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 30. (2) A judge may apportion equitably against the respective parcels of land the amounts included in any claim or claims of liens under subsection (1). 1973, c.62, s.32.

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43(1) Where a claim of lien is intended to attach a disposition of any minerals or petroleum or natural gas rights held from the Crown, the claim of lien shall be filed with the Records Officer, Department of Energy and Mines at Regina, instead of with the registrar, at any time before the lien expires pursuant to section 41, and this Act, including the sections respecting registration and procedure in a land titles office, applies mutatis mutandis.	43(1), 43(2) and 43(3) No material change.	35(1) Where a claim of lien is in connection with any mine, mining claim, mining land, oil well or gas well held from or under the Crown, the claim of lien shall be filed with the Records Officer, Department of Energy and Mines at the city of Regina, instead of with the registrar, and all the provisions of this Act respecting registration and procedure in the land titles office apply mutatis mutandis to the lien.
(2) A claim of lien filed pursuant to subsection (1) shall be vacated upon the surrender, forfeiture, termination or cancellation of the disposition and the Records Officer shall make all necessary entries in his records to give effect to this subsection.		(2) Upon a claim being filed with the Records Officer pursuant to subsection (1), the Records Officer shall forthwith send by mail notice of the claim to the person who appears by the records of the Records Officer to be the owner of the land or of the estate or interest therein charged by the lien.
(3) Where the Records Officer has made the changes mentioned in subsection (2) and the vacated disposition has been reinstated, the Records Officer shall restore the claim of lien in his records whereupon the claim of lien is reinstated and is of the same force and effect as if it had not been vacated pursuant to subsection (2).		(3) Upon the surrender, forfeiture, termination or cancellation of a lease, permit, reservation or other disposition of any minerals, mine, mining claim, mining land, oil well or gas well held from or under the Crown, a claim of lien filed with the Records Officer pursuant to subsection (1) in connection with any minerals, mine, mining claim, mining land, oil well or gas well formerly held under the lease, permit, reservation or other disposition shall be vacated and discharged and the Records Officer, upon receipt of a written notice purporting to be signed by the

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		minister or deputy minister of the department of the Government of Saskatchewan concerned, notifying him that such lease, permit, reservation or other disposition has been surrendered, forfeited, terminated or cancelled, shall make all necessary entries in his records to give effect to this subsection. (4) Where, after the receipt of a written notice purporting to be signed by the minister or the deputy minister of the department concerned, as mentioned in subsection (3), the Records Officer receives a written notice purporting to be signed by that minister or deputy minister notifying him that the lease, permit, reservation or other disposition referred to in the notice mentioned in subsection (3) has been reinstated, the Records Officer shall file the notice of reinstatement and shall make all necessary entries in his records to restore the claim of lien which was vacated and discharged pursuant to subsection (3) and the claim of lien is thereupon reinstated and is of the same force and effect as if the entries made pursuant to subsection (3) had not been made. (5) Subsections (3) and (4) are retroactive and apply with respect to all claims of lien heretofore made to the Supervisor of Mines, Department of Energy and Mines, or to the Supervisor of Mines,

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		Department of Natural Resources, under any former Mechanics' Lien Act. 1973, c.62, s.35; 1983, c.66, s.14.
44(1) Where the Crown is the owner, a claim of lien may be given, together with the affidavit of verification required by subsection 42(3), at any time before the lien expires pursuant to section 41: (a) to the agent, board, local authority or municipal corporation mentioned in clause 2(1)(d) which is the owner of the land; (b) where the owner is Her Majesty in right of Saskatchewan, to a prescribed place or to the department of the Government of Saskatchewan for which the services or materials were provided. (2) A claim of lien mentioned in subsection (1) may be served personally or be sent by registered mail, in which case the claim of lien is deemed to be given two days after the day on which it is mailed.	44(1) and 44(2) The intention of the Committee was that the registration procedure for liens in relation to public improvements should as closely as possible, parallel the procedure for other liens. The claim of lien form and any affidavit required will be the same for both types of liens. Differences will continue to exist with respect to the depository of liens on public property.	62(1) Notwithstanding section 12 or 17, where an improvement mentioned in subsection 12(1) is a public work, the lien created by that section does not attach to the land occupied by the improvement or enjoyed therewith, but constitutes a lien and charge on the amounts directed to be retained by section 19. (2) Sections 30, 31, 32, 34 and 37 do not apply to a lien described in subsection (1). (3) Where, by virtue of subsection (1), a lien does not attach to land, any person who is claiming the lien may give notice of his claim in writing within the statutory period: (a) to the agent or local authority mentioned in clause 2(1)(c.1) who is the owner of the land; or (b) where the owner is Her Majesty in right of Saskatchewan, to any place that may be prescribed by the Lieutenant Governor in Council or to the department of the Government of Saskatchewan for which the work was or is being done, the services were or are being rendered or the materials were or are being furnished.

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		(4) The Lieutenant Governor in Council may prescribe any place to which a notice may be given for the purpose of clause (3)(b). (5) A notice mentioned in subsection (3) or in clause 63(1)(b) may be served personally or may be sent by registered or certified mail, in which case the notice is deemed to be given two days after the day on which it is mailed unless the owner establishes that, through no fault of his own, he did not receive the notice or that it was received by him at some later date. (6) The notice mentioned in subsection (3) shall set out: (a) the name and address of the person claiming the lien and of the person for whom the work was or is being done, the services were or are being rendered or the materials were or are being furnished; (b) the date upon which the last work was done, services rendered or materials furnished or, where the claim is registered before the work, services or furnishing of material is completed, the time within which the work is to be done, services are to be rendered or material is to be furnished; (c) a short description of the work done or being done, of services rendered or to be rendered or of materials furnished or to be furnished;

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		(d) the sum claimed as due or to become due; (e) the address or a description of the location of the land; and (f) an address for service within the province of the person claiming the lien. (7) The matters set out in the notice mentioned in subsection (3) shall be verified by an affidavit of the person claiming the lien or his agent or assignee who has personal knowledge of the matters, and the affidavit of an agent or assignee shall state that he has such knowledge. (8) Where the claim of lien is made by a corporation, it shall be verified by the affidavit of an officer, agent or employee of the corporation who has personal knowledge of the matters required to be verified, and the affidavit of the officer, employee or agent shall state that he has such knowledge. 1979, c.38, s.11
45 In addition to any other ground on which he may be liable, any person who registers a claim of lien or who gives written notice of a lien: (a) for an amount which he knows or ought to know is grossly in excess of the amount which he is owed; or (b) where he knows or ought to know that he does not have a lien; is liable to any person who suffers damages as a result.	45 The Committee felt that owners should be protected from exaggerated claims by establishing a cause of action against a person who registers such a claim of lien.	New

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46 No action may be commenced under this Act to enforce a lien unless a claim of lien is registered.	46 This section makes the registration of a lien a prerequisite to commencing an action to enforce a lien. An owner should not be required to check court house records to determine if an action has been commenced.	New
47(1) Subject to subsection (2), a lien, for which an action has been commenced, expires where an action in which that lien may be realized is not set down for trial within two years of the day the action was commenced. (2) A judge may, upon such conditions as he deems appropriate, extend the time mentioned in subsection (1).	47(1) and 47(2) It was the view of the Committee that every effort should be made to move a lien action quickly through the court process. This section is intended to facilitate that process.	New
48(1) Upon the application of any person, without notice to any other person, the court shall make an order vacating any claim of lien, registered, filed or given, where the person making the application pays into court, or posts security in an amount equal to, the total of: (a) the full amount claimed as owing in any claim of lien vacated; (b) the lesser of $50,000 or 25 per cent of the amount described in clause (a), as security for costs. (2) Upon the application of any person, the court upon notice to such persons as it may require, and upon the payment into court or the posting of security in an amount that the	48(1), 48(2), 48(3), 48(4), 48(5), 48(6), 48(7), and 48(8) The Committee felt that any person should be able to pay into court the face amount of a lien, and without notice to any other party, obtain an automatic discharge of the lien. The lien claimant whose lien is vacated should have a first charge in priority to other lien claimants on the amount paid into court.	40(1) A judge may, upon application of the owner or registered owner and upon notice to the lien claimant who has registered a claim of lien, and upon proof that no other person is entitled to a lien, allow security for or payment into court of an amount equal to the amount claimed in such claim of lien together with an amount as security for costs, to be fixed by the judge, and the judge may thereupon order that the registration of the claim of lien be vacated. (2) A judge, upon application of the owner or registered owner and on notice to the lien claimant, may order the registration of a claim of lien to be vacated upon any other proper ground.

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court determines to be reasonable in the circumstances to satisfy the lien, may make an order vacating any claim of lien. (3) Where an application is made to vacate the registration of a general lien against one or more of the lands but less than all of the lands subject to that general lien, the court may apportion the general lien between the lands in respect of which the application is made and all other lands that are subject to the lien. (4) Where an amount has been paid into court or security has been posted with the court under this section, the court, upon application and upon notice to such persons as it may require, may order where it is appropriate to do so: (a) the reduction of the amount paid into court, and the payment of any part of the amount paid into court to the person entitled; (b) the reduction of the amount of security posted with the court, and the delivery up of the security posted with the court for cancellation or substitution, as the case may be. (5) Money paid into court or security posted under this section does not reduce the amount required to be retained by the owner under section 29. (6) Where an order is made under either subsection (1) or (2), the lien ceases to attach to the land, in		(3) Any security given or money paid pursuant to subsection (1): (a) takes the place of the land against which the claim of lien was registered; and (b) subject to subsection (4) but notwithstanding that no certificate has been registered as required by section 37, is subject to the claim of every person who has registered a claim of lien; to the same extent as if the security or money had been realized by a sale of the property in an action to enforce the lien. (4) The amount found by the judge to be owing to the person the registration of whose claim of lien has been vacated under this section, shall be a first charge upon the security or money so given or paid in except as to claims of persons claiming a lien under this Act for work done, services rendered or materials furnished to such person. (5) Where money has been paid into court or a security deposited in court pursuant to subsection (1), a judge may, upon the application of any interested party, order the money paid out to the persons entitled thereto or the delivery up of the security for cancellation, as the case may require. 1973, c.62, s.40.

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the case of a registered or filed lien, and ceases to attach to the holdbacks and the other amounts subject to a charge under section 28, and becomes instead a charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operations of sections 28, 31 and 33, be in the same position as if the lien had not been registered or written notice of the lien had not been given. (7) Where an order is made under subsection (1) or (2), the money paid into court or any security posted is subject to the claims of all lien claimants whose liens have not expired but such amount as is found owing to any lien claimant whose lien has been vacated plus costs is a first charge on the money or security. (8) Where a lien claimant whose lien has been vacated is not able to prove his claim or where a declaration is obtained under section 51, the court, may upon notice to persons affected, order the money paid out or security delivered to the person found by the court to be entitled thereto.		
49(1) Upon the application of any person and upon notice to such persons as the court may direct, the court shall make an order vacating any claim of lien, where the person making the application pays into court, or posts security in an amount equal to, the total of:	49 Further flexibility is given to a payer to obtain an order vacating a lien by the payment into court of 10% of the contract price as agreed between the parties. No action is required to be commenced to allow the application to be made. Part VIII, dealing with the procedure on an	20(9) Where an action is commenced under this Act to enforce any lien, the owner, contractor or subcontractor, as the case may be, may pay into court in the action the percentage required to be retained by section 19 and, if he so desires, any other moneys owing by him; and

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(a) the full amount of 10% of the contract price as agreed to by the owner and all lien claimants who have registered liens, or as proven to the satisfaction of the court; and (b) the lesser of $50,000 or 25 percent of the amount described in clause (a) as security for costs. (2) Upon vacating a lien pursuant to subsection (1), the claimant's rights are transferred from the land to the amount paid into court and Part VIII applies mutatis mutandis to the enforcement of any lien in relation to the amount so paid into court in the same manner as if the lien were being enforced against the land. (3) Where it is proven on the trial of an action that a lien claimant unreasonably withheld his agreement as to the amount of the contract price, the court may award costs, in an amount within the discretion of the court, against the lien claimant notwithstanding that he has proven his claim.	action, applies to the amount in court which stands in place of the land.	the payment constitutes valid payment in discharge of that owner, contractor or subcontractor to the amount thereof. 1973, c.62, s.20; 1979, c.38, s.7.
50(1) At any time after registration of a lien, and before a certificate of action, in the prescribed form, is registered, any person claiming a mortgage upon, or claiming any estate or interest in the land in respect of which a claim for lien is registered under this Act, or his solicitor, may by request, in the prescribed form, require the registrar to notify the	50(1), 50(2), and 50(3) Any person legally interested in the land may request the registrar to send a notice to lapse. No affidavit setting forth the facts of his claim is required to support the request.	38(1) The registered owner, or a person claiming to be entitled to become the registered owner, or a purchaser under agreement of sale, of land in respect of which a claim of lien has been registered upon filing with the registrar an affidavit setting out the facts as to his claim that he is the registered owner, or that he is entitled to become the registered

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lien claimant by a notice in the prescribed form. (2) Upon receipt of a request mentioned in subsection (1), the registrar shall send, by registered mail, to the address for service of the lien claimant, notice in the prescribed form advising the lien claimant that, unless an action in which the claim of lien may be realized is commenced and a certificate of action in the prescribed form registered against the land in respect of which the lien is claimed within 30 days from the day of mailing of the notice, the lien shall cease to exist. (3) Where no certificate of action or order extending the time for commencing action is registered against the land in respect of which the lien is claimed within the time provided by subsection (2), the lien shall cease to exist and the registrar shall vacate the registration of the lien.		owner, or that he is the purchaser, of the land, as the case may be, may at any time after the registration of the lien require the registrar to notify the lien claimant, by a notice in form F forwarded by registered mail to the address for service of the lien claimant, that unless an action to realize the claim of lien, or in which such claim may be realized, is instituted and a certificate in form E is registered in the land titles office within 30 days from the date of the mailing of the notice, the lien shall cease to exist; and if such action is not so instituted and the certificate so registered within 30 days from the date of the mailing of the notice the lien shall thereupon cease to exist and the registrar shall vacate the registration thereof unless prior to the expiration of the period of 30 days there is registered in the land titles office an order of a judge extending the time for instituting the action.
51(1) Upon application of any person and upon proof that a lien has expired, the court shall declare that the lien has expired, and, in the case of a lien that has been registered order that the lien be	51(1), 51(2) and 51(3) It will be possible to obtain an order declaring that a lien has expired and ordering that the lien be vacated.	New

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vacated. (2) Where a lien has expired for failure to set an action down for trial, the court shall also make an order dismissing the action if there is no other registered lien at the time of the application, otherwise the court shall make whatever order it deems appropriate for the continuation of the action. (3) An application under this section may be without notice, but no order as to costs on the application or in the action may be made upon the application unless notice is given to the person against whom the order for costs is sought.		New
52 Upon application, the court may, (a) order the discharge of a lien; (b) order that the registration of, (i) a claim for lien, or (ii) a certificate of action, or both, be vacated; (c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or (d) dismiss an action; upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.	52 Further powers are given to the court to clear the record on any ground the court finds to be appropriate.	
53(1) Where:	53(1), 53(2), 53(3) and 53(4) This	38(2) Where a certificate in form E

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(a) a certificate of action is registered;
(b) the lien with respect to which the action relates is vacated; and
(c) there remain liens which may be enforced in the action to which that certificate of action relates;

the court shall give directions that are necessary in the circumstances in respect of the continuation of that action or otherwise.

(2) Where:
(a) a certificate of action is registered;
(b) the lien with respect to which the action relates is vacated; and
(c) there are no other liens which may be enforced in the action to which that certificate of action relates;

the court shall also order that the certificate of action is vacated.

(3) Where a certificate of action has been registered, a certificate, in the prescribed form, of the local registrar at the judicial centre in which the action is pending:
(a) that the action has been discontinued; or
(b) that the action having proceeded to trial, judgment was given in favour of the defendant, that no appeal has been entered and that the time limited for an appeal has expired;

may be registered, and when registered the certificate has the same effect as a discharge of the

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section prescribes the effect of vacating a lien on registered liens and the procedure to obtain the removal of a certificate of action. Under the present law, since an action is commenced on behalf of liens, registered and unregistered, it was not possible for a certificate of action to be withdrawn except by the court. This often created hardship for lienholders and owners alike. Subsection (4) will allow a lienholder to withdraw his commencement of action if no other lien is registered, since no other lienholders can be prejudiced.

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has been registered pursuant to subsection (1), a certificate of the local registrar at the judicial centre in which the action is pending:
(a) that the action has been discontinued; or
(b) that the action having proceeded to trial, judgment was given in favour of the defendant, that no appeal therefrom has been entered and that the time limited for an appeal has expired;

may be registered, and when registered the certificate has the same effect as a discharge of the lien signed by the plaintiff or a judge's order vacating the registration of the lien. 1973, c.63, s.38; 1979-80, c.92, s.58.

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lien signed by the plaintiff, or a judge's order vacating the registration of the lien. (4) Where a certificate of action and only one statement of lien is registered, the person who submitted the certificate of action for registration or the person upon whose behalf the statement of lien is registered may register a withdrawal of the certificate of action in the prescribed form.		
54 An order or certificate vacating or discharging a registered lien or vacating a certificate of action that includes a description of the land sufficient for registration and a reference to the registration number of every claim of lien and certificate of action thereby affected may be submitted for registration.	54 This section is intended to specify the description requirements for land titles purposes.	New
55(1) A lien may be discharged either in whole or in part or as to the whole or any part of the land by a discharge, in the prescribed form, executed by the lien claimant or his agent authorized under a registered power of attorney: (a) where the lien is registered or filed by the registration or filing of the discharge; (b) where the lien was given pursuant to section 44, by giving the discharge to the owner, in the manner set out in section 44 for	55(1), 55(2) and 55(3) Under the proposed section, it will be possible to discharge a lien given to a Crown agency and to withdraw a written notice of lien.	39 A lien may be discharged either in whole or in part or as to the whole or any part of the land which it is registered by the execution and registration of a memorandum of discharge executed by the lienholder or his agent thereunto duly authorized in writing or his personal representative or assignee, if any, or trustee in bankruptcy and, except where it is executed by a corporation, duly verified by an affidavit of the attesting witness. 1973, c.62, s.39.

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the giving of the claim of lien. (2) Except where a discharge is executed by a corporation under seal, the discharge shall be verified by an affidavit of an attesting witness. (3) A written notice of a lien may be withdrawn by giving a withdrawal in writing to the person to whom the written notice of a lien was given, and a payer given the withdrawal shall, in respect of the operation of subsection 33(2), be in the same position as if the written notice of a lien had never been given.		
56 A discharge of a lien is irrevocable and the discharged lien cannot be revived, but no discharge affects the right of a person whose lien was discharged to claim a lien in respect of services or materials provided by him subsequent to the registration of the discharged lien.	56 Again, this section is added as a device to further clear the record of liens.	New
PART VI PRIORITIES		
57 A person who has provided services or materials in respect of an improvement may enforce his lien notwithstanding the non-completion or abandonment of the contract or a subcontract by any other person.	57 No material change.	23 Subject to section 18, a lienholder is entitled to enforce his lien notwithstanding the non-completion or abandonment of the contract by any contractor or subcontractor under whom he claims. 1973, c.62, s.23.

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58 The rights of a person having a lien may be assigned by an instrument in writing and, if not assigned, upon his death pass to his personal representative.	58 No material change.	29 The rights of a lienholder or a person claiming any lien under this Act may be assigned by an instrument in writing, and if not assigned, shall pass upon the death of such lienholder or claimant to his personal representatives. 1973, c.62, s.29.
59 Subject to section 67, where one or more parcels that are subject to a general lien are sold or the lien against one or more of the parcels is discharged or vacated the general lien continues for the full amount of the lien against those parcels that are subject to the lien, that were not sold, or against which the lien has not been discharged.	59 This section further illustrates the use of the general lien concept. As one of the parcels is sold or the lien is discharged as it relates to that parcel, the lien continues in full force and for the full amount against the remaining parcels, subject to possible apportionment.	
60(1) A lien is not merged, waived, paid, satisfied, prejudiced or destroyed by: (a) the taking of any security therefor; (b) the acceptance of a promissory note or other bill of exchange therefor; (c) the taking of any acknowledgement of the claim; (d) the giving of time for payment thereof; or (e) the taking of any proceedings for the recovery of a personal	60(1), 60(2) and 60(3) No material change.	42(1) A lien is not merged, waived, paid, satisfied, prejudiced or destroyed by: (a) the taking of any security therefor; (b) the acceptance of a promissory note or other bill of exchange therefor; (c) the taking of any acknowledgement of the claim; (d) the giving of time for payment thereof; or (e) the taking of any proceedings for the recovery of a personal judgment of the claim;

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judgment of the claim; unless the lienholder agrees in writing that it has that effect. (2) Where any promissory note or bill of exchange has been negotiated, the person having the lien may still enforce the lien if he is the holder of the promissory note or bill of exchange at the time when he proves his claim. Proving claim in another action (3) Notwithstanding that a person has given or extended time for payment of any claim for which he has a lien, he may, where an action is commenced by another person to enforce a lien against the same land, prove and obtain payment of his claim as if no time had been given for the payment of the claim.		unless the lienholder agrees in writing that it has that effect. (2) Where the promissory note or other bill of exchange issued in respect of the claim of a lienholder has been negotiated, the lienholder does not thereby lose his lien if he is the holder of the promissory note or other bill of exchange: (a) at the time of the commencement of an action to enforce the lien; or (b) at the time of proving his claim therein, where an action is taken by another lienholder. 1973, c.62, s.42. 43 Notwithstanding that an extension of time has not expired, a lienholder may, where proceedings are commenced by another lienholder to enforce a lien against the same land or trust, prove and obtain payment of his claim therein as if the extension of time had expired. 1973, c.62, s.43.
61 Where a claim of lien is registered under this Act the person entitled to the lien is considered a purchaser pro tanto.	61 No change.	34(2) Where a claim of lien is registered under this Act the person entitled to the lien is considered a purchaser pro tanto. 1973, c.62, s.34.

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62(1) The liens arising from an improvement have priority over all judgments, executions, attachments, garnishments and receiving orders except those executed or recovered upon before the time when the first lien arose in respect of the improvement. (2) No assignment by a contractor or subcontractor of any moneys that may be or become payable under or in respect of any contract or subcontract to which this Act applies is valid as against any lien arising under this Act.	62(1) The priority between lien claimants and unsecured creditors is to be fixed as of the time when the first lien arose. (2) No material change.	25(1) A lien created by this Act has priority over all judgments, executions, attachments, garnishments and receiving orders recovered, issued or made after the lien arises and over all conveyances or mortgages registered after registration of a claim of lien. (2) No assignment by a contractor or subcontractor of any moneys that may be or become payable under or in respect of any contract to which this Act applies is valid as against any lien created by this Act. 1973, c.62, s.25.
63(1) The liens arising from an improvement have priority over all mortgages, conveyances or other agreements registered after a claim of lien is registered. (2) In the case of an agreement for sale of land where the purchase money or part thereof is unpaid and no conveyance has been made to the purchaser, for the purposes of this Act the purchaser shall be considered to be a mortgagor and the seller a mortgagee whose mortgage was registered on the date of the agreement for sale. (3) The liens arising from an improvement have priority in respect of all payments or advances made on account of any mortgage, conveyance	63(1), 63(2) and 63(3) There is no change in the priority structure between lien claimants and other secured creditors. The priority rule in subsection 63(2) continues to be a priority rule between the unpaid vendor deemed to be a mortgagee and the lien claimant. It is not intended that this section provide a priority rule with respect to the payments coming from the buyer as mortgagor to the mortgagee. The balance of the section addresses this latter question.	26(1) A lien has, subject to section 3, priority in respect of all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or advances or after registration of a claim for the lien as provided in the following provisions of this Act and in the absence of such notice in writing or the registration of a claim for lien all such payments or advances have priority over any such lien. (2) In the case of an agreement for sale of land where the purchase money or part thereof is unpaid and no conveyance has been made to the purchaser, for the purposes of this Act the purchaser shall be

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or agreement after written notice of a lien has been given to the person making such payments or advances or after a claim of lien is registered.		considered to be a mortgagor and the seller a mortgagee whose mortgage was registered on the date of the execution of the agreement for sale. (3) Except as otherwise provided by this Act, no person entitled to a lien on any land or on any money is entitled to any priority or preference over lienholders or claimants of the same class entitled to a lien on the land or money and lienholders or claimants of the same class rank pari passu for their several amounts and the proceeds of any sale shall be divided among them pro rata according to their several classes and rights.
64 All persons having a lien who have provided services or materials to the same payer comprise a class, and a person who has provided services or materials to more than one payer is a member of every class to the extent to which his lien relates to that class.	64 This section states the persons who make up a class. It is a codification of the existing law.	New
65(1) Except where it is otherwise provided by this Act: (a) no person having a lien is entitled to any priority over another member of the same class; (b) all amounts available to satisfy the liens in respect of an improvement shall be distributed	65(1) As under the present law there will be no priority among lien claimants except as provided in this section and sections like section 48 where a lien claimant whose lien has been vacated will have priority over other claimants. The balance of subsection (1) codifies the reverse	New

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rateably among the members of each class according to their respective rights; and (c) the lien of every member of a class has priority over the lien of the payer of that class.	order priority which requires lien claimants in lower tiers to be paid before their payer is paid and before other tiers receive funds.	
(2) Any conveyance or mortgage in respect of the land to any person entitled to a lien on the land, in payment of or as security for that claim, whether given before or after that lien arises, is void against all other persons entitled to a lien on the land.	65(2) No material change.	26(4) Any conveyance or mortgage of, or charge on, land given by the owner to any person entitled to a lien on the land under this Act, by reason of any improvement on the land, in payment of or as security for such lien, whether given before or after such lien arises, shall, as against other persons entitled to a lien under this Act on any such land that has arisen with respect to the same improvement, be deemed to be fraudulent and void. 1973, c.62, s.26; 1973-74, c.61, s.4.
66(1) The lien of a labourer has priority over the lien of any other person providing services or materials to the improvement, other than for wages to the extent of an amount equal to forty regular time working days' wages without a claim of lien being filed for the lien and without proof that all of the wages were earned on the land upon which a lien is claimed if it is proven that the labourer did provide services on the land and was employed by the owner, contractor or subcontractor. (2) Every device to defeat the priority given to labourers by this section is void. (3) Where a labourer is owed an amount greater than to the extent of forty regular-time working days' wages, the labourer: (a) is entitled to be paid the	66 Under the present law section 28 is virtually ignored and section 56 of The Labour Standards Act governs the priority of labourers in relation to other lien claimants. To assert the priority under this latter Act, no claim of lien need be registered. The Committee felt that the flexibility of The Labour Standards Act should be maintained but that priority should be afforded to labourers only, being those employees who improve the land and to the extent of an amount equal to 40 days' wages. The definition of wages is expanded to include all money owing to an employee. With respect to the balance of a labourer's claim, he continues to have priority over his payer and shares pro rata with other claimants.	28(1) The lien of every labourer whose lien is for wages has, to the extent of 30 days' wages, priority over all other liens and charges derived through the same contractor or subcontractor to the extent of and on the amount required to be retained by section 19 to which the contractor or subcontractor through whom such lien is derived is entitled; and the liens of all such labourers shall rank thereon pari passu. (2) Every labourer is entitled to enforce a lien in respect of a contract not completely performed. (3) Where the contract has not been completed when the lien is claimed by a labourer, the percentage

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additional amount out of any sum actually coming to the owner, contractor or subcontractor who has employed the labourer; and (b) is entitled to share pro rata with any other lien claimant; and (4) This section supersedes section 56 of The Labour Standards Act.		applicable under section 19 shall be calculated on the value of the work done, services rendered and materials furnished by the contractor or subcontractor by whom the labourer is employed having regard to the contract price, if any. (4) Every device by an owner, contractor or subcontractor intended to defeat the priority given by this Act to the lien of a labourer for his wages is in respect of the labourer void. 1973, c.62, s.28.
67 Where a general lien is realized against land in an action in which other liens are also realized against the land: (a) the general lien shall rank with the other liens according to the rules of priority set out in section 64 only to the extent of: (i) the total value of the general lien; divided by, (ii) the total number of parcels to which the person having the general lien provided services or materials under his contract or subcontract; and (b) in respect of the balance of the general lien, it shall rank next in priority to all other liens against the land, whether or not of the same class.	67 Further detail is provided in this section about a general lien. Since a general lien claimant is entitled to claim with respect to all amounts owing to him on each parcel owned by the same owner, it would be unfair to other lien claimants if in any distribution the general lien claimant could share pro rata with respect to the full amount of his claim. This section provides for subordination with respect to all amounts above the apportioned amount.	New
68 Where land that is subject to a lien is destroyed in whole or in part, any amount received by a payer	68 The policy with respect to the distribution of holdback moneys is continued for insurance proceeds.	New

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on a contract or subcontract or a mortgagee by reason of any insurance on the land shall take the place of the land so destroyed and shall be distributed in accordance with the priorities set out in this Part.		
69 Where an interest in the premises is sold or leased under an order of the court or by a trustee appointed under Part VII, the proceeds received as a result of that disposition, together with any amount paid into court under subsection 85(5), shall be distributed in accordance with the priorities set out in this Part.	69 Again, moneys in court or in the hands of a court appointed trustee must be distributed in accordance with the priorities established by this Part.	New
70 Moneys found by a court to be trust funds shall be distributed among lien claimants who have proved their claims according to the priorities established by this Part notwithstanding that such parties have not registered a claim of lien or a certificate of action.	70 As above.	New
71 If the estate or interest sold pursuant to this Act is a leasehold interest, the purchaser at the sale shall be considered to be the assignee of the lease.	71 No change.	52 If the estate or interest sold pursuant to an action under this Act is a leasehold interest, the purchaser at the sale shall be considered to be the assignee of the lease. 1973, c.62, s.52.

PART VII

ADDITIONAL REMEDIES

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72(1) Where a labour and material payment bond is in effect in respect of an improvement, any person whose payment is guaranteed by that bond has a right of action to recover the amount of his claim, in accordance with the terms and conditions of the bond, against the surety on the bond, where the principal on the bond defaults in making the payment guaranteed by the bond. (2) Nothing in this section makes the surety liable for an amount in excess of the amount that he undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith by the surety either before or after judgment is obtained against the surety. (3) The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all the rights of that person.	72 Under the present law only the obligor under a labour and material payment bond may sue the surety to recover on the bond in the event of default by the principal. A labour and material payment bond guarantees the payment of certain labourers and suppliers whose claims arise prior to the default. The proposed change will give a beneficiary on the bond i.e., a labourer, the right to pursue the surety directly. The origin of this section is the Ontario Construction Lien Act.	New
73(1) Any person having a lien or who is the beneficiary of a trust under this Act may, at any time, by written request, require information as follows: (a) from the owner or his agent: (i) the terms of the contract including the names of the parties to the contract, the contract price and the state of accounts between the owner and	73 Trust beneficiaries are given the same right to demand information as lien claimants. The owner's right to demand information from subcontractors is limited to when a subcontractor has registered a lien or given written notice of a lien. Lien claimants and trust beneficiaries are given the right to require information with respect to a joint holdback trust account and the	44(1) A lien claimant may at any time by a notice in writing: (a) demand of the owner or his agent the terms of the agreement with the contractor under which the work has been or is to be done, services have been or are to be rendered or materials have been or are to be furnished, and a statement of the amount due and unpaid thereunder; (b) demand of a mortgagee or unpaid vendor, or the agent or either of them, of the land the

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the contractor;

(ii) the name and address of the bank, trust company or credit union in which a joint holdback trust account has been opened and the account number thereof;

(iii) a statement as to the particulars of credits to and payments from the joint holdback trust account including the date of the credits and payments, and the balance at the time the information is given;

(iv) a copy of any labour and material payment bond in respect of the contract posted by the contractor with the owner;

(v) where the owner is the Crown names and addresses of lien claimants who have given claims of lien to the Crown pursuant to section 44;

(b) from a mortgagee or an unpaid vendor, or the agent of either of them:

(i) the terms of the mortgage or agreement for sale;

(ii) a statement showing the amount advanced under the mortgage, the dates of those advances, and of any arrears in payment including any arrears in the payment of interest; or

(iii) a statement showing the amount secured under the agreement for sale and any arrears in payment including any arrears in the payment of

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list of those persons who have given claims of lien to the Crown.

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terms of the mortgage or the agreement for the sale of the land in respect of which the work has been or is to be done, the services rendered or to be rendered or the material furnished or to be furnished, and a statement of the amount due and unpaid thereunder; or

(c) demand of the contractor or subcontractor, or the agent of either of them, the terms of any agreement with the owner, contractor or subcontractor to which the person of whom the demand is made is a party in respect of which the work has been or is to be done, services have been or are to be rendered or materials have been or are to be furnished, and a statement of the amount paid on the agreement and the amount due and unpaid thereunder.

(2) The owner may at any time by notice in writing demand from the contractor or subcontractor:

(a) the terms of, or a copy of, the contract between the contractor and his subcontractor with respect to the construction of the improvement;

(b) a written statement of the amounts paid by the contractor to the subcontractor, or by the subcontractor to another subcontractor or to a materialman or other person for work done, services rendered or materials

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interest. (2) The owner may, by written request, require from a subcontractor when a claim of lien has been registered or a written notice of lien has been received by him, and, from the contractor, at any time: (a) the terms of any subcontract including the names of the parties to the subcontract, the subcontract price and the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor, or any other person providing services or materials, which statement shall be verified by statutory declaration by the person from whom the information is requested or his agent; (b) a copy of any labour and material payment bond posted by a subcontractor with the contractor or by a subcontractor with another subcontractor. (3) The person of whom a request is made under subsection (1) or (2) shall comply with the request within 10 days after the day the request is served upon him. (4) If the person refuses or neglects to comply with a request within the time provided in subsection (3) or knowingly or negligently mis-states the information requested, he is liable to the person for any loss or damage suffered in an action therefor or in any action for the enforcement		furnished, as the case may be, at the time of the demand; (c) a written statement of the amounts paid, with full particulars of dates and amounts, by the contractor to the subcontractor, or by a subcontractor to another subcontractor, or by the contractor or subcontractor to a materialman or other person, as the case may be, for work done, services rendered or materials furnished, at the time of the demand; (d) a written statement of the amounts owing from the contractor to a subcontractor, or from the subcontractor to another subcontractor, or by the contractor or subcontractor to a materialman for work done, services rendered or materials furnished at the the time of the demand; and that the facts set forth in such written statement be verified by statutory declaration by the person upon whom the demand is made, or his agent having personal knowledge of the facts thereof. (3) The person of whom a demand is made in accordance with subsection (1) or (2) shall comply with the demand within 10 days after the demand is served upon him or his agent. (4) If the person of whom a demand is made in accordance with subsection (1) or (2) refuses or

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of the lien. (5) In addition to the remedy given to an owner under subsection (4), if a person refuses to comply with a request under subsection (2) within the time provided, the owner may: (a) where the request is made of a contractor withhold further payments to the contractor; (b) where the request is made of a subcontractor, instruct the contractor or another subcontractor to withhold further payments to the subcontractor or to a subcontractor of the subcontractor; until the contractor or subcontractor, as the case may be, has complied with the request. (6) The court may on summary application at any time before or after an action is commenced for the enforcement of a lien make an order requiring the owner, mortgagee, vendor, contractor or subcontractor, as the case may be, to produce for inspection all contracts, subcontracts, documents, books or records relating to the contract or subcontract or to the payment of the contract or subcontract price, and to make any copies thereof, and may make such order as to costs of the application and order as the court deems just. (7) No appeal lies from an order made under subsection (6).		neglects to comply with the demand within the time limited for so doing, or knowingly falsely states any fact in his written statement, and the owner or lienholder suffers any loss by reason of such refusal, neglect or false statement the person on whom the demand is made is liable to the owner or lienholder in an action therefor or in any action for the enforcement of the lien, in which case section 55 applies. (5) If the person of whom a demand is made in accordance with subsection (2) does not within 10 days after the receipt of the demand deliver or mail to the owner a written statement of the facts demanded and a statutory declaration verifying the facts, the owner may: (a) in case the demand is made upon a contractor withhold furthe payments to the contractor under the contract;

(b) in the case the demand is made upon a subcontractor instruct the contractor or another subcontractor to withhold further payments to the subcontractor or to a subcontractor of the subcontractor;

until the contractor or subcontractor, as the case may be, has complied with the demand.

(6) The court or a judge may on summary application at any time before or after action is commenced for the enforcement of a lien make an order requiring the owner, mortgagee, vendor, contractor or subcontractor, as the case may be, to produce for inspection all contracts, documents, books or records relating to the contract or to the payment of the contract price, and to make copies thereof, and may make such order as to costs of the application and order as is just.

(7) No appeal lies from an order made under subsection (6). 1973, c.62, s.44.

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74(1) Any person who has verified a claim for lien that has been registered is liable to be cross-examined without an order on the claim for lien at any time, irrespective of whether an action has been commenced. (2) Cross-examination on a claim of lien can only take place once under subsection (1), but the contractor, the payer of the lien claimant, and every person named in the claim for lien who has an interest in the land are entitled to participate therein. (3) Any person intending to examine a person under subsection (1) shall give at least seven days notice of the examination to: (a) the person to be examined or his solicitor; (b) every other person named in the claim of lien as having an interest in the land; (c) the contractor; and (d) the payer of the lien claimant. (4) The Rules of Court of the Court of Queen's Bench pertaining to examinations apply, mutatis mutandis, to cross-examinations under this section.	74 This section has been added to provide greater information to an owner, contractor or mortgagee by allowing any person to give seven days notice of intention to cross-examine a person who has verified a claim of lien irrespective of whether an action has been commenced.	New
75(1) Any person having a lien, or any other person having an interest in the land, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.	75 The power to appoint a trustee is not limited to when an action has been commenced. Basically, the proposed provision permits the appointment of a trustee who may manage, sell, mortgage or lease the land and take steps to complete, in whole, or in part, the improvement.	50(1) At any time after the issue of the originating notice, the judge may, on the application of the plaintiff or any lien claimant, mortgagee or other person interested, appointed a receiver of the rents and profits of the property against which the claim for lien is registered, upon such terms and upon the giving of such security

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(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may: (a) act as a receiver and manager and, subject to the approval of the court, mortgage, sell or lease the land or any part thereof; (b) complete or partially complete the improvement; (c) take appropriate steps for the preservation of the land; and (d) subject to the approval of the court, take such other steps as are appropriate in the circumstances. (3) Subject to subsection (4), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2). (4) Where an amount is advanced to a trustee as a result of the exercise of any powers conferred upon him by this section: (a) the mortgagee making the advance takes priority, to the extent of the advance, over every lien for services or materials provided before the date of the trustee's appointment; (b) the amount received is not subject to any claim of trust or lien arising out of services or materials provided before the date of the trustee's appointment.		or without security as the judge considers just. (2) The proceeds received by a receiver appointed under subsection (1) shall, after deduction therefrom of all rates, taxes, royalties, insurance and other expenses necessary or incidental to the maintenance and operation of the property, including the costs of management, be paid into court to be applied in such manner as may be directed by the judge. (3) Any plaintiff, lien claimant, mortgagee or other person interested may make an application to the judge at any time before or after judgment who may hear viva voce evidence or consider affidavit evidence, or both, and appoint, upon such terms and upon the giving of such security or without security as the judge considers just, a trustee or trustees with power to manage, mortgage, lease or sell the property against which the claim for lien is registered; and the exercise of such powers shall be under the supervision and direction of the judge and the trustee, or trustees, when so directed by the judge, may complete or partially complete the property and, in the event that mortgage moneys are advanced to the trustee or trustees as the result of any of the powers conferred upon him or them under this subsection, such moneys take priority over every claim of lien existing as of the date of the appointment.

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(5) Any interest in the land that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance that the court directs. (6) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.		(4) Any property directed to be sold under subsection (3) may be offered for sale subject to any mortgage or other charge or encumbrance if the judge so directs. (5) The proceeds of any sale made by a trustee or trustees under subsection (3) shall be paid into court and are subject to the claims of all lien claimants, mortgagees or other persons interested in the property so sold as their respective rights are determined, and, insofar as applicable, subsection 51(5) applies. (6) The judge shall make all necessary orders for the completion of any mortgage, lease or sale authorized to be made under subsection (3). (7) Any vesting order made of property sold by a trustee or trustees appointed under subsection (3) vests the title of the property free from all claims for liens, encumbrances and interests of any kind except in cases where sale is made subject to any mortgage, charge, encumbrance or interest as hereinbefore provided. (8) Notwithstanding anything in subsections (1) to (7), no receiver or trustee shall be appointed with respect to property that is improved or intended to be improved by or on behalf of the owner as his homestead as defined in subsection 45(1). 1973, c.62, s.50.

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76(1) At any time during the construction of an improvement, where a dispute arises with respect to the payment of money with respect to the improvement, the owner or contractor and the lien claimant may refer the matter to an arbitrator of their choosing. (2) The arbitrator may be a lawyer, an architect, an engineer or a chartered accountant. (3) The arbitrator: (a) shall render his decision within 7 days of hearing the matter or such further time as may be unanimously agreed by the parties; and (b) shall give written reasons for his decision but wherever possible the procedure shall be summary. (4) The arbitrator's function is to resolve the dispute to enable the improvement to be completed as expeditiously as possible. (5) The decision of the arbitrator is binding on the parties who have referred the matter tothe arbitrator except that it may be appealed to the court on a question of law alone within 30 days of giving the decision.	76 This section is inserted as an alternative method of dispute resolution. It is hoped that this procedure will be utilized by lien claimants instead of registering a claim of lien or commencing action. The procedure is to be informal and it is anticipated arbitration could take place right on the job site.	New

PART VIII

Committee's Draft Proposal for a Builders' Lien Act

JURISDICTION AND PROCEDURE

77(1) An action to enforce a claim of lien or trust arising under this Act shall be commenced by action by having issued a statement of claim in the court and unless otherwise herein provided the Rules of Court of the Court of Queen's Bench shall apply to the proceedings.

(2) Where an action to enforce a lien or trust arising under this Act has been commenced at a judicial centre and:

(a) the judicial centre is other than the one nearest to which the land in question is situated;

(b) the judicial centre is the one nearest to which the land in question is situated but a party to the action desires to have the action transferred to another judicial centre;

(c) another action is commenced or is pending in the court oat another judicial centre with respect to, or arising substantially out of the same subject matter; or

(d) for any other reason the action may be tried and determined more conveniently at a judicial centre other than the one at which the action was commenced;

the court may, upon application, order that the action be transferred to a judicial centre to be named in the order upon such terms as to costs

Explanation of Draft

77 The Committee was of the opinion that the procedure for the commencement of actions by originating notice was cumbersome and the original objective of having matters decided in chambers on the originating notice was not met. The Committee proposes that the procedure for the enforcement of a lien should be the same as for the enforcement of any right and should be by way of issuing and serving a statement of claim.

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46(1) Repealed. 1979-80, c.92, s.58.

(2) Where an action to realize under a lien has been commenced at a judicial centre and:

(a) the judicial centre is other than the one nearest to which the land in question is situated;

(b) the judicial centre is the one nearest to which the land in question is situated but a party to the action desires to have the action transferred to another judicial centre;

(c) Repealed. 1979-80, c.92, s.58.

(d) another action is commenced or is pending in the Court of Queen's Bench at another judicial centre with respect to, or arising substantially out of the same subject matter; or

(e) for any other reason the action may be tried and determined more conveniently at a judicial centre other than the one at which the action was commenced;

a judge of the Court of Queen's Bench may, upon application by any party to the action made before the trial of the action, order that the action be transferred to a judicial centre to be named in the order upon such terms as to costs or otherwise as the judge considers just.

(3) Upon the transfer of an action under subsection (2), the proceedings previously taken shall be and be deemed to have been valid and effectual and may be continued in the same manner as if the action

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or otherwise as the judge considers just. (3) No appeal lies from an order made under subsection (2).		had been originally entered in the court or at the judicial centre to which the action has been ordered to be transferred. (4) Upon receiving a copy of the order of a judge for the transfer of an action under subsection (2), the local registrar shall immediately transmit the record of the action and a copy of the order to the local registrar of the Court of Queen's Bench at the judicial centre named in the order. (5) The costs are to be according to any scale that the judge may specify. (6) Repealed. 1979-80, c.92, s.58. (7) This section applies to all actions pending when this Act comes into force. (8) No appeal lies from an order made under subsection (2). (9) Subject to subsection (2), an action to enforce a lien under this Act shall be brought, tried and determined in the district at the judicial centre: (a) nearest to the place where the owner resides or carries on business; or (b) nearest to the place where the contract between the owner and the contractor was or is to be performed. (10) A defendant in any action or proceeding to enforce a lien on land or against a trust fund, may set off or set up by way of counterclaim against the plaintiff or against any defendant any right or claim arising

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		out of the same transaction for any amount whatever whether such set off or counterclaim sounds in damages or not. (11) Proceedings to enforce a lien created by this Act shall be commenced by the issue of an originating notice form G with such changes as are necessary to meet the nature of the claim made and the relief claimed. (12) Unless a judge otherwise orders there shall be not less than 30 days between the date of service, or the last date of service, of the originating notice and the day for the hearing of the matter.
78(1) Any number of lienholders claiming liens on the same land or through the same contract or against the same trust may join in the same action. (2) Subject to subsection (3), the following shall be joined as party defendants in the action: (a) the owner and the contractor, if any; (b) the person primarily liable on the contract or subcontract;	78(1), 78(2) and 78(3) In this proposed section, other lienholders may join in the action. The persons to be named as defendants continue to be the same as under the existing Act.	46(13) Any number of lienholders claiming liens on the same land or trust may join in issuing an originating notice to enforce their liens and an action brought by a lienholder shall be taken to be brought on behalf of all lienholders on the property or trust in question. 1973, c.62, s.46; 1979-80, c.92, s.58. 47(1) Subject to subsection (1.1), the following shall be joined as party defendants in the originating notice: (a) the owner and the contractor, if any; (b) the person or persons primarily liable on the contract;

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(c) each lienholder other than the plaintiff who has registered his claim of lien as required by this Act and whose lien has not been vacated; and (d) each other person who by the records of the land titles office appear to have an estate or interest in or charge upon the land or trust in question against whom any relief is claimed or who would be affected by any judgment, order or direction that may be made or given in the action or proceeding.		(c) all lienholders other than the plaintiff who have registered their claims of lien as required by this Act or who are known to the plaintiff and that may be entitled to claim a lien; and (d) all other persons who by the records of the land titles office appear to have any estate or interest in or charge upon the land or trust in question against whom any relief is claimed or who would be affected by any judgment, order or direction that may be made or given in the action or proceeding.
(3) Where an action is in respect of a lien that, by virtue of section 21, does not attach to land, the following shall be joined as party defendants in the action: (a) the owner and the contractor, if any; (b) the person primarily liable on the contract or subcontract; and (c) each lienholder other than the plaintiff who has given his claim of lien as required by section 44 of this Act.		(1.1) Where an action is in respect of a lien that, by virtue of subsection 62(1), does not attach to land, the following shall be joined as party defendants in the originating notice: (a) the owner and the contractor, if any; (b) the person or persons primarily liable on the contract; and (c) all lienholders other than the plaintiff who are known to the plaintiff and may be entitled to claim a lien.

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79(1) Unless otherwise ordered, a plaintiff in an action may join with his lien or trust claim a claim for breach of his contract or subcontract. (2) A defendant in an action may: (a) counterclaim against the person who named him as a defendant in respect of any claim that he may be entitled to make against that person related to the making of the improvement; (b) cross claim against a co-defendant in respect of any claim that he may be entitled to make against that person related to the making of the improvement. (3) Where a person against whom a claim is made in a statement of claim, counterclaim, cross claim or third party claim defaults in the delivery of a statement of defence in respect of that claim and has been noted for default, he shall not be permitted to contest the claim of the person who named him as a defendant or third party, or to file a statement of defence, except with leave of the court to be given only where the court is satisfied that there is evidence to support a defence, and where leave is granted, the court may: (a) make any order as to costs that it considers appropriate; (b) give directions as to the conduct of the action. (4) Except where leave has been granted under subsection (3) a	79(1), 79(2), 79(3) and 79(4) It will be possible to counter claim and cross claim in the same manner as is currently provided under the Rules of Court.	47(2) Each defendant in the proceedings shall, within 10 days after the service upon him of the originating notice, file in the office of the local registrar in which the proceedings are pending detailed particulars of his claim and of the estate of interest in or lien against the land or trust fund in question, as the case may be, duly verified by affidavit, and within the period of 10 days deliver a copy of the particulars and the affidavit to the plaintiff or his solicitor. (3) A defendant who desires: (a) to contest the right of claim to a lien upon the land or trust fund, or the amount claimed, by the plaintiff or any other lien claimant; or (b) to raise a set off or a counterclaim against the claim of the plaintiff or other lien claimant; shall within 20 days after service upon him of a copy of the originating notice, file with the local registrar a written notice setting forth the grounds upon which the dispute, or the set off or counterclaim, is based with full particulars of the facts intended to be relied upon, and within the period of 20 days serve a copy of the notice upon the plaintiff and any other lien claimant whose claim is contested.

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defendant or third party who has been noted for default shall be deemed to admit all allegations of fact made in the statement of claim, counterclaim, cross claim or third party claim, as the case may be, and shall not be entitled to notice of or to participate in the trial of the action or any proceedings in respect of the action and judgment may be given against him and he may lose his claim upon the land or trust fund, as the case may be.		(4) A defendant who fails to appear may, upon proof of service on him of the originating notice, lose his claim upon the land or trust fund, as the case may be. 1973, c.62, s.47; 1979, c.38, s.10; 1979-80, c.92, s.58.
80 An examination for discovery of any party is binding against that party, and all other parties of like interest and may be put into evidence by any party.	80 The use of examinations for discovery is intended to be as expansive as possible.	New
81(1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character having regard to the amount and nature of the liens in question. (2) Except where otherwise provided by this Act, no interlocutory proceedings shall be permitted without the order or direction of the court, or the consent of all parties on the application. (3) Any issue may be tried on viva voce or affidavit evidence as the court may direct.	81 It is proposed that an interlocutory procedure can be allowed with the consent of the parties. The court is given flexibility with respect to the submission of evidence.	59(1) The object of this Act being to enforce liens at the least expense, the procedure shall be as far as possible of a summary character having regard to the amount and nature of the liens in question. (2) Except where otherwise provided by this Act, no interlocutory or other proceedings shall be permitted without the consent of the judge, and then only upon proper proof that such proceedings are necessary. 1973, c.62, s.58.
82 The court may obtain the assistance of a merchant, accountant,	82 No change.	60(1) The judge may obtain the assistance of any merchant, accountant, actuary, building contractor, architect, engineer or

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actuary, building contractor, architect, engineer or other person in such a way as it considers fit, to enable it to determine better any matter of fact in question, and may fix the remuneration of such person and direct the payment thereof by any of the parties.		other person in such way as he considers fit, the better to enable him to determine any matter of fact in question, and may fix the remuneration of any such person and direct payment thereof by any of the parties.
83 A lien claimant whose claim is for an amount within the monetary jurisdiction given to the Provincial Court of Saskatchewan under The Small Claims Enforcement Act may be represented in the court by an agent who is not a barrister and solicitor.	83 This provision is intended to curb the cost of enforcing a claim by allowing a lien claimant to represent himself with respect to claims within the monetary jurisdiction of The Small Claims Enforcement Act. Since any individual may represent himself in any court this section will be of primary benefit to corporate lien claimants.	New
84(1) The court may at any time make an order awarding carriage of the action to any person who has registered a claim of lien. (2) Where more than one action is brought to enforce a claim of lien or trust in respect of the same improvement, the court may: (a) consolidate all the actions into one action; and (b) award carriage of the action to any person who has registered a claim of lien.	84 The court at the present time can direct that one lien claimant has carriage of the action to save costs in the prosecution of an action.	46 Where more than one originating notice is issued in respect of the same land or trust fund, a judge, upon the application of any lienholder may: (a) give the conduct of the action to any lienholder; or (b) consolidate all the causes of action into one cause of action and give the conduct of the action to any plaintiff. 1973, c.62, s.48.

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85(1) The court: (a) shall try the action, including any set off, cross claim, counterclaim and third party claim, and all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it; and (b) shall take all accounts, make all inquiries, give all directions and do all things necessary to dispose finally of the action and all matters, questions and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action and shall embody all the results in the judgment.	85(1), 85(2), 85(3), 85(4), 85(5), 85(6) and 85(7) There is little change proposed to the powers of the court in this section. The court is given the authority to make interim distributions of property.	51(1) Upon the hearing of an originating notice to enforce or realize a lien created by this Act, the judge shall decide all questions that arise therein or that are necessary to be tried in order to dispose of the action completely and to adjust the rights and liabilities of all parties concerned and shall take all accounts, make all inquiries and give all directions and do all other things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the hearing and to adjust the rights and liabilities of, and give all necessary relief to, all parties concerned and shall embody all the results in the judgment.
(2) The court may award any lien claimant a personal judgment, whether he proves his lien or not, upon any ground relating to his claim that is disclosed by the evidence against any party to the action for any amount that may be due to him and that he might have recovered in a proceeding against that party.		(2) All judgments in favour of lienholders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after the sale of the property adjudged to be sold.
(3) The court may order that the estate or interest charged with the lien be sold and when, by the judgment, a sale is directed of the estate or interest charged with the lien, the court may direct the sale to take place at any time after		(3) The judge may order that the estate or interest charged with the lien be sold and when, by the judgment a sale is directed of the estate or interest charged with the lien, the judge may direct the sale to take place at any time after judgment allowing a reasonable time for advertising the sale, and may make all necessary orders for the

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judgment allowing a reasonable time for advertising the sale, and may make all necessary orders for the completion of the sale and vesting the estate or interest sold in the purchaser.		completion of the sale and vesting the estate or interest sold in the purchaser.
(4) The court may also direct the sale of any materials and authorize the removal of them.		(4) The judge may also direct the sale of any materials and authorize the removal of them.
(5) When a sale is held the moneys arising therefrom shall unless otherwise ordered be paid into court to the credit of the action and the court shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the sale his actual disbursements in connection therewith; and where a sufficient amount to satisfy the judgment and costs is not realized from the sale the court shall certify the amount of the deficiency and the persons who are entitled to recover the same and the amount to which each of them is entitled and the person liable to pay the amounts.		(5) When a sale is held the moneys arising therefrom shall be paid into court to the credit of the action and the judge shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the sale his actual disbursements in connection therewith; and where a sufficient amount to satisfy the judgment and costs is not realized from the sale the judge shall certify the amount of the deficiency and the persons who are entitled to recover the same and the amount to which each of them is entitled and the person or persons liable to pay the amounts; and the person or persons entitled thereto may enforce payment thereof by execution or otherwise as a judgment of the court. 1973, c.62 s.51.
(6) The court may make one or more interim orders for the distribution of moneys in court upon such conditions as the court may consider appropriate.		
(7) A judgment in favour of a lienholder shall determine the person who is personally liable for the amount of the judgment and who is personally liable to pay any deficiency which may remain after the sale of the property adjudged to be		

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sold and the person or persons entitled thereto may enforce payment thereof by execution or otherwise as a judgment of the court.		
86(1) Subject to subsection (2), any order as to the costs in an action or on an application is in the discretion of the court, and an order as to costs may be made against: (a) any party to the action or application; (b) the solicitor or agent of any party to the action or application, where the solicitor or agent has: (i) knowingly participated in the registration of a claim of lien, or represented a party in the commencement of or the trial of an action, where it is clear that the claim of lien is without foundation or is for a grossly excessive amount; or (ii) by his conduct prejudiced or delayed the conduct of the action; and any order as to costs may be made on a solicitor and client basis. (2) Where the least expensive course is not taken by a party under this Act, the costs allowed to him shall not exceed what would have been incurred if the least expensive course had been taken by him. (3) Where the registration of a lien or a certificate of action is ordered to be vacated or where, in an action to realize a lien, judgment is given in favour of or against a claim of	86 The Committee is suggesting the inclusion of a costs provision which is intended to penalize parties who impede the progress of the trial. The origin of this idea is the Ontario Construction Lien Act. Recent court activity in that province may indicate that this provision is in and of itself lengthening and adding to court action. Further consideration should be given to this section.	57(1) Subject to subsections (2), (3), (4) and (5), any order as to costs in an action under this Act is in the discretion of the judge who tries the action. (2) The costs of the action, exclusive of actual disbursements, awarded to the plaintiffs and successful lienholders shall not exceed in the aggregate 25% of the total amount found to have been actually due on the liens at the time of the registration thereof, and shall be apportioned and borne in such proportion as the judge who tries the action directs, but in making the apportionment he shall have regard to the actual services rendered by or on behalf of the parties respectively, provided that where a counterclaim is set up by a defendant, the amount and apportionment of the costs in respect thereof are in the discretion of the judge who tries the action. (3) Where costs are awarded against the plaintiff or other persons claiming liens, they shall not exceed, except in the case of a counterclaim, 25% of the claim of the plaintiff and the other claimants, besides actual disbursements, and shall be

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lien, the court may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration but no such amount shall be allowed where the claimant fails to establish a valid lien.		apportioned and borne as the judge who tries the action directs. (4) Where the least expensive course is not taken by a plaintiff, the costs allowed to him shall in no case exceed what would have been incurred if the least expensive course had been taken. (5) Where a lien is discharged or vacated under this Act or where judgment is given in favour of or against a claim for a lien, in addition the costs of the action, the judge who tries the action may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration thereof, but this does not apply where the claimant fails to establish a valid lien. (6) The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the judge to whom the application, or by whom the order, is made. 1973, c.62, s.56.
PART IX GENERAL RULES		
87(1) Every contractor and subcontractor shall maintain in his principal place of business in the	87 The Committee is suggesting the imposition of a record keeping requirement enforceable on summary	New

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province a true and correct written record of the following particulars in respect of each contract and subcontract which he enters into under or by virtue of which a lien may arise under this Act: (a) the whole or essential terms of the contract or subcontract; (b) the amounts of payments and times for payments under the contract or subcontract; (c) the name, last known address and business of the parties to the contract or subcontract; (d) the dates upon which payments are made under the contract or subcontract and the amount of each payment; (e) the hours worked by any labourer on any parcel of land; (f) the amount of each deduction made from each payment into any holdback trust account from the contract or subcontract and the particulars thereof; (g) the date of commencement of work undertaken in the performance of the contract or subcontract; (h) the date and particulars of any certificate given by a payment certifier as to the substantial performance or completion of the contract or completion of a subcontract and the name and address of the payment certifier; (i) the date of substantial performance or completion of the contract or completion of a	conviction. It was the Committee's view that one of the impediments to the speedy resolution of claims in the construction industry is the inability to prove to an opposing party the validity of a claim, with the use of documentary evidence only, as rarely does such evidence exist. The Committee felt that the inclusion of this section might serve to focus the attention of the parties on the need to keep written records. A similar provision exists in the Manitoba Builders' Liens Act.	

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subcontract. (2) The records required to be maintained under subsection (1) shall be kept up-to-date not less frequently than monthly. (3) The records required to be maintained under subsection (1) in respect of a contract or subcontract shall be maintained and preserved by the contractor or subcontractor, as the case may be, for a period of not less than one year after the date of the completion of the improvement with respect to which the contract or subcontract relates. (4) A separate record shall be maintained by contractors and subcontractors under subsection (1) in respect of each separate contract and subcontract. (5) Every person who contravenes or fails to comply with a provision of this section is guilty of an offence and liable, on summary conviction, to a fine of not more than $500 or to imprisonment for a term of not more than three months, or to both such fine and such imprisonment and every director or officer of a corporation who knowingly assents to or acquiesces in an offence by the corporation under this section, in addition to the corporation, guilty of the same offence and liable, on summary conviction, to a similar penalty. (6) Where a person contravenes or fails to comply with a provision of		

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this section for a period of more than one day, he is guilty of a separate offence for each day that the contravention or failure to comply continues.		
88 An agreement by any person who provides services or materials to an improvement that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.	88 There is no change in intention proposed by this section.	11 Every agreement, written or verbal, express or implied, that this Act or any provision thereof shall not apply or that any benefit or remedy provided by it shall not be available or which in any way purports to limit, modify or abrogate any such benefit or remedy is void. 1973, c.62, s.11.
89(1) No certificate or claim of lien is invalidated by reason only of a failure to comply strictly with the prescribed forms or subsection 42(2) unless in the opinion of the court, a person has been prejudiced thereby and then only to the extent of the prejudice suffered. (2) Nothing in subsection (1) shall be construed as dispensing with the registration of the claim of lien as required by this Act.	89 A substantial compliance only is required with respect to all forms.	33(1) A substantial compliance only with sections 30, 32 and 62 is sufficient and no lien shall be invalidated by reason of failure to comply with any of the requirements of those sections unless in the opinion of the judge the owner, contractor or subcontractor, mortgagee or other person, as the case may be, is prejudiced thereby and then only to the extent to which he is thereby prejudiced. (2) Nothing in subsection (1) shall be construed as dispensing with the registration or the giving of notice of the claim of lien as required by this Act. 1973, c.62, s.33; 1979, c.38, s.8.

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90 During the continuance of any lien, no portion of any of the materials or the property affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to a judge, ex parte or with such notice as the judge may direct.	90 No change.	14(3) During the continuance of a lien no part of the material giving rise to the lien shall be removed to the prejudice of the lien and any attempt at such removal may be restrained by a judge on summary application made to him.
91 The Lieutenant Governor in Council may make regulations: (a) prescribing forms and providing for their use; (b) increasing the amount of any contract for which there may be earlier release of the holdback pursuant to section 38; (c) prescribing any place to which claims of lien may be given pursuant to subsection 44(1).	91 It is proposed that all forms will be prescribed by regulation. This will give greater flexibility to the provision of forms and will make it possible to vary forms to correct problems as they arise.	New
92(1) This Act or any part thereof comes into force on a day or days to be fixed by proclamation of the Lieutenant Governor in Council. (2) This Act applies to all contracts entered into on or after the day section 93 comes into force and to the subcontracts arising under those contracts and to all services or materials provided thereunder. (3) Notwithstanding section 93, The Mechanics' Lien Act continues to apply to all contracts entered into	92 The proposed Act will only apply to those contracts entered into after the coming into force of the Act. The Mechanics' Lien Act will continue to govern contracts entered into prior to the coming into force of this Act and any amendments to such contracts.	

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before the coming into force of this Act, and to the subcontracts arising under those contracts and to all services or materials provided thereunder. (4) Notwithstanding section 93, where a contract entered into before the coming into force of this Act is amended in good faith on or after that day, The Mechanics' Lien Act applies to that amendment and to all subcontracts arising under it and to all services or materials provided thereunder.		
93 Sections 1 to 60 and 62 and 63 of The Mechanics' Lien Act are repealed.	93 Section 61 dealing with improvements to chattels will remain part of The Mechanics' Lien Act. It will not be carried forward into The Builders' Lien Act.	